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An American Edition. 16mo. New York, 1801.

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22 September 1912.

A

PRACTICAL TREATISE

OR

COMPENDIUM

OF

THE LAW

OF

MARINE INSURANCES.

BY JOHN ILDERTON BURN,
OF THE INNER TEMPLE.

Cives integros incolumesque servare.—Cic.

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TO

JAMES ALLAN PARK, ESQ.

ONE OF HIS MAJESTY'S COUNSEL,

THE FOLLOWING WORK

IS

RESPECTFULLY INSCRIBED,

IN TOKEN OF THE HIGH ESTIMATION IN WHICH HIS TALENTS AND PROFESSIONAL LABOURS

ARE HELD

BY

HIS MOST OBEDIENT

AND VERY HUMBLE SERVANT,

THE AUTHOR.

D98

INTRODUCTION.

IT is with much diffidence that the author of the following ſheets ſubmits them to public inſpection, nor would he have preſumed to do ſo ſolely upon his own judgment. The advice of ſome profeſſional friends, whoſe good opinion he is happy to poſſeſs, has influenced his determination: they have flattered him with the hope that his work may prove uſeful to the commercial world; and even of ſome ſervice to his brethren of the profeſſion.

He is well aware that their partiality will neither diſarm criticiſm nor ſupply want of merit; yet, he reſts aſſured, that from their obſervations much leſs objectionable matter will remain than would have been found had

he truſted to the unaided efforts of his own mind.

To compriſe much uſeful information in a ſmall compaſs has always been deemed meritorious, as it facilitates the acquiſition of knowledge, and tends to diſſemimate it through a wider circle of ſociety.

The books already before the public on the law of inſurances are too voluminous to be generally read, even by thoſe who are intereſted in the ſubject; and, it may be added, for the ſame reaſon, too diffuſe to be eaſily comprehended and retained.

The author is not unaware that his ground is previouſly occupied by the Treatiſe of Mr. Park, which juſtly merits the eminence to which it has arrived. To profeſſional men, it communicates the law without perplexity, and they will always have a pleaſure in conſulting a work which, beſides its perſpicuity, has the additional merit of being the depoſitary of all the caſes of importance on the ſubject decided in our courts of law up to the time of its appearance.

pearance. Previous to the publication of that gentleman's work, the law of inſurances was, in this country, comparatively in an indigeſted ſtate. But as this branch of the commercial law of England has, from the number and equity of later deciſions, aſſumed a conſiſtency which it did not formerly poſſeſs, it has become ſuſceptible of thoſe various arrangements which may be obſerved in other parts of the law.

Upon this ground the author truſts he will not be thought preſumptuous in ſtating, that a compendious digeſt, immediately calculated for the uſe of merchants and their agents, ſtill remains a deſideratum in the mercantile world. With a view to ſupply this deficiency, he commenced the following compilation. It will not do him, he is ſure, any diſcredit to acknowledge, that he has reſorted to Mr. Park's work as the principal ſource of his information, and to that diviſion of Mr. Gwillim's Abridgment of Law which treats of this ſubject. At the ſame time he begs leave to

remark, that he has not ſervilely followed the plan of either of thoſe authors; but has adopted ſuch an arrangement, as he humbly conceived to be beſt calculated for conveying a clear view of the ſubject to thoſe for whom the work was chiefly deſigned. The policy itſelf has been ſo much animadverted upon in the courts, and its defective mode of ſtating the agreements of the parties ſo frequently noticed, that he very early reſolved not to make that writing the baſis of his plan. He has purſued a different courſe; and has endeavoured to inveſtigate the nature of the contract, without immediate reference to the inſtrument—the eſſential requiſites thereof—the engagements of the parties—the different ſpecies of marine inſurance—the conſequences of a failure in any of ſuch requiſites—the perils inſured againſt, with the evidence generally required to ſupport actions on policies of inſurance.

He has not preſumed to make any other alteration of the materials; and though much

abridged, it is hoped nothing in any reſpect important to the ſubject has been omitted. Of this, however, the public will determine, and to their deciſion it is reſpectfully ſubmitted.

J. I. B.

37, *Old Broad-Street*,
1*ſt March*, 1801.

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A COMPE

A

COMPENDIUM

OF THE

Law of Marine Insurances.

CHAPTER THE FIRST.

OF INSURANCE IN GENERAL—ITS NATURE, USE, ORIGIN, AND CONSTRUCTION—DIFFERENT SORTS OF POLICIES—VALUED AND OPEN.

CHAP. I.

MARINE INSURANCE is that admirable invention of more modern times, by which commercial adventurers by sea are saved from the immediate destruction that might otherwise ensue from sudden losses, by any of the perils mentioned in the instrument by which insurance is effected. The agreement which constitutes an insurance is, therefore, termed a contract of indemnity, and the instrument is technically called the policy: and although the insurer alone subscribes his name to this instrument (who, on that account, is denominated an underwriter), yet the insured is equally bound to all conditions expressed on his part

CHAP. I. in the policy, as well as to certain conditions not literally expreſſed therein, the non-obſervance of which either makes the whole contract void from the beginning, or releaſes the underwriter from all future obligation, from the period of ſuch breach of condition.

The nature of this contract is, in fact, to divide the riſk of a voyage among many perſons for a ſmall conſideration, proportionate to the real or apprehended dangers likely to be encountered, and varying with circumſtances.

Notwithſtanding great learning and ingenuity have been diſplayed by various writers on the ſubjects of Marine Law, and of Inſurance, in order to trace its origin to a period of remote antiquity, it would appear from the beſt authorities to have originated ſome time near the period of the Hanſeatick League, in the thirteenth century. The towns of Hamburgh and Lubeck were the firſt which united for mutual defence againſt the nations round the ſhores of the Baltick. They compiled their naval laws principally from the laws of Wiſbuy, but with many very conſiderable additions and improvements.

As inſurance law varies in the different commercial countries in Europe, it becomes a matter of leſs importance to trace its progreſ-

ſive

ſive improvements to the preſent times. In England the legiſlature thought it neceſſary to interfere in the reign of King George the Firſt, to eſtabliſh two diſtinct corporations, with a competent joint ſtock, and under proper regulations, to make aſſurances of ſhips, goods, or merchandizes, at ſea, or going to ſea, in excluſion of all other ſocieties and partnerſhips.

At that period it ſeems that much miſchief had been done by private perſons obtaining large premiums for inſurance, and failing afterwards to make good the loſſes ſuſtained by their becoming bankrupt.

The inſtrument itſelf, though awkwardly framed, and looſely worded, has not received any material alterations: having been rendered more certain and determinate, by the multitude of adjudged caſes, in queſtions relating to inſurance, in our different courts of juſtice.

Marine policies are not to be ranked with deeds of ſpecialty, (as they are termed in law) as not being under ſeal; but they have always been conſidered as of the higheſt credit, and as containing engagements of the moſt ſacred nature.

No alteration can be made in the policy, after the ſignature of the underwriter, with-

CHAP. I.

Henkle v. the Royal Ex. Aſſur. Company, 1 Vez. 317. Park 2.

out the conſent of both parties. Attempts have, indeed, been made to have it amended at the inſtance of one party, and the Court of Chancery has been reſorted to for that purpoſe, but without effect. In a caſe before Lord Hardwicke, the firſt part of the voyage inſured was from London to Oſtend, and the veſſel was warranted an Oſtend ſhip. The aſſured (the plaintiff in equity) ſuggeſted that ſhe was not ſuch a ſhip as the warranty required at the time the policy was effected, and could not be made ſo till ſhe arrived at Oſtend. He, therefore, prayed that the policy might be amended, by making the voyage commence from Oſtend. His Lordſhip would not infer that the terms of the agreement were contrary to the words of the policy, ſaying that, as it was twice reduced into writing, the aſſured could not be allowed thus to vary the written words of ſuch an inſtrument at a period ſubſequent to its execution.

Motteux v. the Gov. & Comp. of the London Aſſurance, 1 Atk. 545. Park 3.

Yet manifeſt and unqueſtionable miſtake will always be remedied, as courts of common law are bound by ſimilar rules of deciſion with courts of equity on theſe ſubjects. For example, it ſometimes happens that a memorandum or certain minutes are ſigned by the underwriter, and by ſome evident miſtake

mistake the policy is so made out as to vary from these written notes, but by comparison with them may be explained: here, a court of justice will order the error to be rectified, so as to give effect to the real intent of the parties, and to the true meaning of the original agreement.

It is scarcely necessary to remark that the words of the policy (more particularly when mistakes have crept in) may be, and are, frequently altered with the consent of both parties. And it is not uncommon for the underwriter to demand an increase, or submit to a diminution of premium, in proportion as the risk may appear to be varied upon such alteration.

In transactions of insurance, as in other concerns, the non-performance of a duty will make the negligent person answerable in damages for his neglect. As for instance, if a broker be properly instructed to effect a policy, and either omits, or so delays the execution of his instructions, that the intention of the employer is frustrated, and a loss is sustained, the broker is there considered in law as having made himself the insurer, and is in the same situation in which he would have been, had he underwritten such policy

CHAP. I.

Harding v. Carter and another, Park 4.

as he had been inſtructed to effect. The ſame liability attaches, where, through inadvertency, or by ſome deception, the broker leads an employer into a miſtaken belief that an inſurance has been procured.

A printed form of the policy is now univerſally uſed; and all particular conditions are ſubjoined in written clauſes, which being the immediate act of the parties, they have ſuperior authority whenever they militate againſt the printed words; and courts of juſtice always rely upon them as expreſſing the intention with which the agreement was made.

Burr. 1555. Lord Mansfield.

The form now uſed is nearly the ſame which was adopted two hundred years ago; but its antiquity cannot preſerve it from juſt cenſure. From making uſe of the ſame words in different ſenſes, it is very irregular, confuſed, and frequently ambiguous.

The cuſtody of the policy belongs, of right, to the aſſured; and an action of trover will lie for this, as for any other valuable paper, or property.

The above general remarks are perhaps ſufficient for our preſent purpoſe; and we ſhall now proceed to conſider the eſſentials to the contract

CHAP. I.

Park 15.

contract of inſurance, which are*: Firſt, The name of the perſon for whom the inſurance is made: Secondly, The names of the ſhip and maſter: Thirdly, Whether they are ſhips, goods, or merchandizes, upon which the inſurance is made: Fourthly, The name of the place where the goods are laden, and whither they are bound: Fifthly, The time when the riſk begins, and when it ends: Sixthly, All the various perils and riſks which the inſurer takes upon himſelf: Seventhly, The conſideration, or premium, paid for the riſk or hazard run: Eighthly, The month, day, and year, on which the policy is executed: Ninthly, The ſtamps required by act of parliament. Of each of theſe in their order.

Firſt, Of the name of the aſſured. Policies in blank were formerly very common, but parliament interfered, in order to put an end to a practice ſo miſchievous. The now ſubſiſting parliamentary regulations with regard to this point are thoſe of the ſtatute

* In this part of my ſubject, I have adopted the arrangement of Mr. Park, which I found, upon mature conſideration, to be equally applicable to a compendium as to his larger work.

CHAP. I.

28 Geo. 3. chap. 56.

28 Geo. 3. chap. 56. by which it is required of perſons effecting policies, to inſert in the policy "the name or names, or the uſual ſtyle and "firm of dealing of one or more of the perſons "intereſted in ſuch aſſurance;" or inſtead thereof there muſt be inſerted "the name or "names, or the uſual ſtyle and firm of deal-"ing of the conſignor or conſignors, con-"ſignee or conſignees, of the goods or pro-"perty ſo to be inſured; or the name or "names, or the uſual ſtyle and firm of deal-"ing, of the perſon or perſons reſiding in "Great Britain, who ſhall receive the order "for and effect ſuch policy, or of the perſon "or perſons who ſhall give the order or di-"rections to the agent or agents immedi-"ately employed to negotiate or effect ſuch "policy." The ſtatute further declares that every policy made or underwritten contrary to the true intent and meaning of this act, ſhall be null and void to all intents and purpoſes.

Park 18.

Upon this act it has been held, that it is not neceſſary, where a policy is effected by an agent, to add the word *agent*, or any other deſcription to his name, in the policy itſelf. And it has alſo been decided, that a policy effected

effected by a broker, describing himself therein *as agent*, has sufficiently complied with the requisition of the statute 25 Geo. 3.* CHAP. I.

Secondly, Of the names of the ship and master. It seems to be necessary by the law and usage of merchants to insert the names of the ship and master, although there are insurances generally "upon any ship or "ships;" and their validity was fully ascertained in the case of Kewley and another against Ryan. 2 H.Blackst. Rep. 343.

On a rule obtained to shew cause why there should not be a new trial, the court declared as to this point, that the legality of the policy on ship or ships was too well established, both by usage and authority, to be disputed; and that the assured had clearly a right to apply such assurance to whatever ship he thought proper within the terms of it; for which the case of Henchman v. Offley was an authority. Do. 345. Park 20.

Thirdly, Whether they be ships, goods, or merchandizes, upon which the insurance is made, is a fact which must be stated. It is absolutely necessary to specify whether the

* This act of 25 Geo. 3. chap. 44., which required the name of the agent, &c., is now wholly repealed by the act above quoted.

CHAP. I.

inſurance be made on ſhips, goods, or merchandizes; but not to particularize the different ſorts of goods. Yet a ſpecification by their marks, numbers, and packages, may prevent much trouble in proving the particular goods inſured.

There are certain kinds of merchandize, of a periſhable nature, ſuch as corn, fiſh, ſalt, fruit, flour, and ſeed, on which the underwriters will not be anſwerable for a partial loſs, but general average only, unleſs the ſhip be ſtranded. And in inſurances on ſugar, hemp, flax, hides, ſkins, and tobacco, they conſider themſelves free from partial loſſes, not amounting to 5 per cent. On all other goods, as well as on the ſhip and freight, for a partial loſs under 3 per cent. unleſs ariſing from a general average, or the ſtranding of the ſhip, they conſider themſelves alſo diſcharged.

Park 21.

Theſe things are aſcertained by a memorandum, introduced in the year 1749, and altered by the two companies in 1754, by ſtriking out "or the ſhip be ſtranded," in conſequence of a deciſion by Chief Juſtice Ryder, that a ſhip having run aground (although ſhe got off again) was a ſtranded ſhip within the meaning of the memorandum.

What

What ſhall be conſidered as loſſes within the meaning of this memorandum, will be the ſubject of future inveſtigation.

There are ſome kinds of property which do not fall under the general denomination of goods in a policy.

In an action on a policy of inſurance of the captain's goods, an underwriter and a broker proved that goods laſhed on deck, ſhip's proviſions, and captain's clothes, are not within a general policy on goods, the riſk being greater; and the premium alſo is increaſed when ſuch goods are meant to be inſured, which are alſo inſured by name. Goods in a policy mean ſuch only as are merchantable—part of the cargo. Lord Mansfield thought this conſiſtent. Roſs v. Thwaite, Sitting after Hil. 10 Geo. 3. at Guildhall. Park 21.

Fourthly, The places where goods are laden, and where bound, which have always been held neceſſary; and muſt, in truth, be ſo, from the nature of the contract. It is uſual alſo to ſtate where the ſhip may touch or ſtay, during the voyage.

Fifthly, The time when the riſk commences and ends, which the policy expreſsly declares, according to the agreement of the parties.

Sixthly, The perils and riſks which the underwriter inſures againſt; viz. "all perils of

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"the ſeas, men of war, fire, enemies, pirates, "rovers, thieves, jettiſons, letters of mart, "and counter-mart, ſurpriſals, takings at ſea, "arreſts, reſtraints, and detainments of all "kings, princes, and people, of what nation, "condition, or quality ſoever; barratry of "the maſter and mariners, and all other "perils, loſſes and misfortunes, that have or "ſhall come to the hurt, detriment, or da-"mage of the ſaid goods and merchandize, "and ſhip, or any part thereof*."

Harford v. Maynard, before Ld. Mansfield, Guildhall, Hil. Vac. 1785.

That the underwriters are liable for a robbery of goods inſured when committed by thieves from without, cannot be doubted; but it is not clearly aſcertained, that if there be thieves on ſhipboard, this is ſuch a caſe as comes within the terms of the policy.

In addition to the riſks enumerated, it is a general practice to inſure loſt or not loſt, which is peculiar to Engliſh policies.

34 Geo. 3. c. 80. ſ. 10. & 39 Geo. 3. c. 80. ſ. 24, 25.

By the acts of parliament for regulating the ſlave trade, it is provided, that though the

* By the 26 Geo. 3. chap. 86. the owner's reſponſibility is limited to the value of the ſhip and freight, even in caſe of external robbery, without the privity of the maſter or mariners: and by the ſecond ſection, owners are wholly exempted from any loſs occaſioned by fire.

uſual

usual printed words may remain on the face of the policy, no loss or damage shall thereafter be recoverable on account of the mortality of slaves, by natural death or ill treatment, or loss by throwing overboard of slaves on any account whatever, or loss or damage by restraints and detainments, by kings, princes, people, or inhabitants of Africa, where it shall be made appear, that such loss or damage has been occasioned through any aggression for the purpose of procuring slaves, and committed by the master of any such ship, or by any person or persons commanding any boat or boats, or party or parties of men belonging to any such ship, or by any person or persons acting by the direction of any such master or commander respectively.

Park 25.

Seventhly, The consideration or premium for the risk, which is the most material part of the policy. This is always expressed to have been received at the time of underwriting, although in practice, policies are effected, in general, by the intervention of brokers, between whom and the insurers open accounts are kept by the usage of trade. The underwriter may have an action against the broker for money had and received

Airy and others, A signees of Milton, v. Bland, Tri Sittings a Guildhall, 14 Geo.

CHAP. I. ceived to his uſe. It would appear that the broker, alone, is the debtor to the underwriter.

Eighthly, The day, month, and year, in which the policy is executed.

Ninthly, The proper and legal ſtamp, according to the 35 Geo. 3.

Section 1ſt. If the amount to be inſured	*s.*	*d.*
be 100l. or leſs, ...	2	6
And, for every hundred, or part of a hundred, ...	2	6
If the premium be 10s. per cent. or leſs, ...	1	3
For every hundred, or part of a hundred, ...	1	3

Section 4th. That it ſhall be lawful to uſe ſtamps of two ſhillings and ſixpence, for every two hundred pounds inſured, inſtead of one ſhilling and threepence, for every hundred, where the premium ſhall not exceed 10s. per cent. on the ſum inſured.

Section 11th. That every contract for inſurance ſhall be ingroſſed or printed, and called a Policy of Inſurance; and that the premium paid or given, the particular riſk or adventure inſured

inſured againſt, with the names of the ſubſcribers and underwriters, and ſums inſured, ſhall be reſpectively expreſſed in the policy, otherwiſe it ſhall be null and void.

Section 12th. No policy to be made for any certain term, longer than twelve calendar months.

Section 18th provides for an allowance to be made by the commiſſioners, when the ſums inſured on homeward voyages ſhall be found to exceed the intereſt of the aſſured.

Section 13th provides for the making any alteration in the policy after it has been underwritten, ſo that it be made before notice, after determination of the riſk originally inſured, and the premium exceed 10s. per cent. and ſo that the thing inſured remain the property of the ſame perſon, and that the alteration do not prolong the term allowed by this act, or any further ſum be inſured by reaſon thereof.

Sections 15th and 16th impoſe a penalty of 500l. on perſons procuring, and brokers effecting, inſurances not duly ſtamped; and the latter cannot either demand broker-

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age, or the money expended for premiums.

Section 17th. Every underwriter is alſo liable to the like penalty for ſubſcribing ſuch illegal policy.

No rule has been more frequently followed in the conſtruction of policies than the uſage of trade; for as the protection of the inſured, and advancement of commerce, are the great objects of inſurance, it were abſurd to imagine that where the end is inſured, the uſual means of attaining it can be excluded.

A policy of inſurance ſhall be conſtrued to run until the ſhip ſhall have ended, and be diſcharged of the voyage; for arrival at the port to which ſhe was bound is not a diſcharge till ſhe is unloaded; and it was ſo adjudged by the whole court upon a demurrer.

Skin. 243.

But when the owner of goods inſured brought down his own lighter, received the goods out of the ſhip, and, before they reached land, an accident happened whereby the goods were damaged, a ſpecial jury of merchants, under the expreſs direction of Lord Chief Juſtice Lee, found that the inſurer was diſcharged, although the inſurance was upon goods to London, and till the ſame ſhould be ſafely landed there.

Sparrow v. Carruthers, 2 Str. 1236.

Where

Where the policy is general, from A to B, the construction that the ship shall not be discharged of the voyage till she be unloaded, may be perfectly right; but if it contain the words usually inserted "and till the ship shall have moored at anchor twenty-four hours "in good safety," the underwriter is not liable for any loss arising from seizure, after she has been twenty-four hours in port, though made in consequence of an act of barratry of the master during the voyage. It would be impossible to lay down any fixed rule were it extended beyond the time limited in the policy; and all would be uncertainty and confusion. CHAP. I. 1T. P. 252.

Willes J. delivered the unanimous opinion of the court in this cause, and concluded his argument by observing, that "there must be "some certain and reasonable limitation in "point of time laid down by the court, when "the insurer shall be released from his en- "gagement. If he be liable for a month, "he may for a year, and so on. And we "all think that the law of insurances would "be left unsettled, and in much confusion, "if any other time were suggested than that "presented by the policy, namely, *the conti-* "*nuance of the voyage, and the ship's being* "*moored*

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"*mored twenty-four hours in ſafety.*" "We "are all therefore of opinion, that judgment "ought to be given for the defendant."

2 Salk. 443. "Warranted to depart with convoy" muſt be conſtrued according to the uſage among merchants, that is, from ſuch place where convoys are to be had.

Bond v. Gonſales, 2 Salk. 445. Park 34. Caſe upon a policy of inſurance, which was to inſure the William galley in a voyage from Bremen to the port of London, warranted to depart with convoy. The caſe was, the galley ſailed from Bremen, under convoy of a Dutch man of war, to the Elbe, where they were joined by two other Dutch men of war, and ſeveral Dutch and Engliſh merchant ſhips, whence they ſailed to the Texel, where they found a ſquadron of Engliſh men of war and an admiral. After a ſtay of nine weeks they ſet ſail from the Texel, the galley was ſeparated in a ſtorm, taken by a French privateer, and re-taken by a Dutch privateer, and paid eighty pounds ſalvage. It was ruled by Holt, chief juſtice, that the voyage ought to be according to uſage, and that their going to the Elbe, though out of the way, was no deviation; for till after the year 1703, (prior to which time this policy was made,) there was no convoy

voy for ships directly from Bremen to London. Verdict for the plaintiff.

Waples v. Eames, 2 Str. 1244. Park 34.

The ship Success was insured "at and "from Leghorn to the port of London, and "till there moored twenty-four hours in good "safety." She arrived the 8th of July at *Fresh Wharf*, and moored, but was the same day served with an order to go back to the *Hope*, to perform a fourteen days' quarantine. The men upon this deserted her, and on the 12th of the month the captain applied to be excused going back, which petition was adjourned to the 28th, when the Regency ordered her back; and on the 30th she went back, performed the quarantine, and then sent up for orders to air the goods; but before she returned, the ship was burnt on the 23d of August, and now the question was, Whether the insurer was liable?

Lord Chief Justice Lee ruled, that though the ship was so long at her moorings, yet she could not be said to be there in *good safety*, which must mean the opportunity of unloading and discharging, whereas here she was arrested within the twenty-four hours, and the hands having deserted, and the Regency taken time to consider the petition, there was no default in the master or owners: and it

was

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was proved that, till the fourteen days were expired, no application could be made to air the goods; whereupon the jury found for the plaintiff.

Gordon v. Morley. Campbell v. Bordieu. 2 Str. 1265. Park 36.

On an insurance from London to Gibraltar, warranted to depart with convoy, it appeared there was a convoy appointed for that trade at Spithead, and the ship Ranger having tried for convoy in the Downs, proceeded for Spithead, and was taken in her way thither. The insurers resisted the demand of indemnity, alleging that, as there was a French war, the ship should not have ventured through the channel, but have waited for occasional convoy.

Lord Chief Justice Lee, however, was of opinion, that the ship was to be considered as under the defendant's insurance to the place of general rendezvous, according to the interpretation of the words, *warranted to depart with convoy*, Salk. 443, 445. and if the parties meant to vary the insurance from what is commonly understood, they should have stated it. Two special juries of merchants found their verdicts agreeably to that direction.

Park 35.

In an insurance upon freight, if an accident happen to the ship before any goods are put on board, which prevents her from sailing,

ing, the inſured upon the policy cannot recover the freight which he would have begun to earn, if the goods had been ſhipped. CHAP. I.

The plaintiff inſured on ſhip and freight, at and from Jamaica to Briſtol. A cargo was ready to put on board: but the ſhip being careening in order for the voyage, a ſudden tempeſt aroſe, and ſhe and many others were loſt. The rigging and parts of her were recovered and ſold, and the defendant paid into court as much as, upon an average, he was liable to for the loſs of the ſhip; but the plaintiff inſiſted to be allowed 600*l.* for the freight the ſhip *would have earned* in the voyage, if the accident had not happened. But, as the goods were not actually on board, ſo as to make the plaintiff's right to freight commence, Lord Chief Juſtice Lee held, he could not be allowed it, and he was non ſuited. Tonge v. Watts, 2 Stra. 1251.

But in a valued policy it is otherwiſe; and the only queſtion in ſuch caſe is, merely whether it be a gaming policy and colourable inſurance, or a *bona fide* tranſaction. If the latter, the aſſured is intitled to recover for the whole value in the policy*. 3 T.R. 362. Park 35.

* Vide page 35 poſt. where the diſtinction between a valued, and an open policy is ſtated.

So

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6T. R. 478. Thompſon v. Taylor.

So alſo in an open policy on freight, *at and from London and Teneriffe to any of the Weſt India iſlands*, (Jamaica excepted,) the underwriters were held liable to pay the inſurance, though the ſhip ſailed from London in ballaſt, and was captured before her arrival at Teneriffe, where her cargo was to be put on board. But as the ſhip was under a charter party to *depart out of the river Thames, and proceed to Teneriffe, and then to load and receive on board from the freighters* 500 *pipes of wine, to be delivered in the Weſt Indies, for the freight of which* 500 *pipes the freighters covenanted to pay* 35*s. per pipe;* the court held, that the inſtant the ſhip departed from the Thames, the contract for freight had its inception, and the plaintiff was intitled to recover.

In conſtruing policies the *ſtrictum jus*, or *opex juris*, is not to be laid hold of; but they are to be conſtrued largely, for the benefit of trade, and for the inſured.

Tierney v. Etherington 1 Burr. 348.

Thus in an aſſurance of goods from Malaga to Gibraltar, and from thence to England or Holland, the parties having agreed that the goods might be unloaded at Gibraltar, and re-ſhipped in one or more Britiſh ſhip or ſhips, and it appearing in evidence that there was no Britiſh ſhip at Gibraltar, but

but the goods had been unloaded and put into a ſtore-ſhip, (which was always conſidered as a warehouſe) the inſurers were held to be liable for the loſs of theſe goods in the ſtore-ſhip.

A clauſe was inſerted in a policy, that 8l. per cent. of the premium ſhould be returned if the ſhip ſailed from any of the Weſt India iſlands with convoy for the voyage, and arrived. The court held, that the arrival of the ſhip, whether with or without convoy, intitled the party to a return of the premium ſtipulated. Simond v. Boydell, Dougl. 255.

A bill was filed in the Court of Chancery, which ſtated that the ſhip Eyles, late in the Eaſt India company's ſervice, was, in the year 1732, at Bengal, at which time the owner employed I. H. to inſure the ſhip in the London aſſurance office for 500l. The adventure was to commence from her arrival at Fort St. George, and thence to continue till the ſaid ſhip ſhould arrive in London, and that it ſhould be lawful for the ſaid ſhip, in the ſaid voyage, to ſtay at any ports or places without prejudice, and that ſhe was, and ſhould be rated at intereſt or no intereſt, without further account; in conſideration whereof I. H. paid 15l. premium. The Eyles came to Fort St. Motteux & others v. the Gov. & Company of Lon. Aſſur. 1 Atk. 545.

CHAP. I. St. George; in February 1733, in her way to England; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ſhips, &c. ſhe ſailed to Bengal to be refitted, and after being ſheathed, in her return upon her homeward-bound voyage, ſhe ſtruck upon the Engilee ſands and was loſt. Evidence was read to prove for the plaintiff, that Bengal was the moſt proper place to refit, that ſhe went there from neceſſity, not to trade; and took nothing on board but water, proviſion, and ballaſt.

Lord Chancellor Hardwicke—"As to the queſtion, whether there has been a breach, or, in other terms, a loſs, within the meaning of this policy, the general principles laid down by the plaintiff's counſel are right, that ſtreſs of weather, and the danger of proceeding on a voyage, when a ſhip is in a decayed condition, are to be conſidered. In ſuch a caſe, if ſhe went to the neareſt place, I ſhould conſider it equally the ſame as if ſhe had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumſtance, that the governor ordered the lading to be taken out, to ſhew the neceſſity of the ſhip's being repaired, but there is not

not a ſyllable of proof why ſhe might not have been equally well repaired at Fort Saint George. There is one part of this caſe which diſtinguiſhes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ſhip was loſt in July 1733, three weeks before the time of making this policy, ſo that clearly the ſhip was not at Fort Saint George at the time the agreement was made; and therefore it is a material queſtion, whether it comes within the agreement." His lordſhip directed an iſſue to try, whether the loſs in July 1733 was a loſs during the voyage, and according to the adventure agreed upon; which iſſue was afterwards found for the plaintiff upon a trial in the Common Pleas.

By Lord Hardwicke—" At and from Bengal to England " means the firſt arrival at Bengal; and it was agreed, that when ſuch words are uſed in policies, *firſt arrival* is always implied. 1 Atk. 548.

So alſo when a ſhip is inſured at and from a place, and arrives at that place, ſo long as ſhe is preparing for the voyage inſured the inſurer is liable: but if all thoughts of the voyage be laid aſide, and the ſhip lie there five, ſix, or ſeven years with the owner's pri- Chitty v. Selwin, 2 Atk. 359.

 vity,

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vity, it ſhall never be ſaid the inſurer is liable, for that would ſubject him to the whim and caprice of the owner.

Camden v. Cowley, 1 Blackſt. 417.

This was an action on the homeward policy, on a ſhip at and from Jamaica to London: the ſhip had been inſured generally from London to Jamaica, and was loſt in coaſting the iſland, after having touched for ſome days at one port there, but before ſhe had delivered all her outward-bound cargo at the other ports of the iſland. In order to ſhew when the homeward-bound riſk commenced, it was neceſſary to determine when the outward-bound riſk ended; and the jury, (which was ſpecial) after examining merchants as to the cuſtom, decided by their verdict, that the outward riſk ended when the ſhip had moored in any part of the iſland, and did not continue till ſhe came to the laſt port of delivery.

A motion was made for a new trial, but refuſed: becauſe it had been thoroughly tried and no new light could be thrown upon it, although Lord Mansfield ſaid the inclination of his opinion was the contrary way at the trial. Mr. Juſtice Wilmot thought, the conſtruction put upon the policy by the jury was right. In a ſimilar caſe Lord Mansfield laid down the ſame doctrine to the jury, namely, that

Barraſs v. the London Aſſurance,

that the outward risk *upon the ship* ended twenty-four hours after its arrival in the first port of the island to which it was destined: but that the outward policy *upon goods* continued till they were landed.

Sitting after Hil. 1782, at Guildhall. Park 39.

This doctrine has met with material confirmation in a very modern decision. An action was brought upon a policy of assurance on *the ship* Pallister, and *on goods* on board thereof, on a voyage at and from Georgia to Jamaica. The ship arrived in Montego Bay, and moored at anchor, and there also the agent of the plaintiff sold and delivered the greatest part of the cargo to Messrs. Adams and Hatton, merchants there. The captain then entered into a charter party with Adams and Hatton, to proceed from thence to Saint Anne's, and there to take in a cargo for London. After unloading the greatest part of the cargo at Montego Bay, and remaining there a month, it was verbally agreed, that the remainder of the cargo (which was lumber) should be carried as ballast to Saint Anne's; and accordingly the vessel, after taking in some fustic, proceeded towards Saint Anne's, but was wrecked and never arrived there. It was urged for the plaintiff, that in such an insurance, the ship might go from port to port;

Leigh v. Mather, Sittings at Guildhall after Mich. Term, 1795. Park 39.

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and that, at all events, the goods were protected by the policy, *till they were all discharged and safely landed.*

Lord Kenyon was clearly of opinion, and was confirmed in that opinion by a special jury, to whom his lordship particularly referred upon this occasion, that the *risk on a ship* ceased, *after she had been moored at anchor twenty-four hours* in the *first port* of the island, *for the purpose of unloading:* and the facts disclosed having manifested that Montego Bay was also the original destination of the cargo, and that its not being wholly delivered there was only prevented by a new agreement, the *loss of the goods* cannot be recovered under this policy of insurance. A ship insured to *Jamaica generally* cannot be permitted to go round the whole island, from port to port, for the purpose of unloading her cargo, especially where, as in this case, the owner of ship and goods is the same person. The plaintiff was non-suited.

Pelly v. the Gov. & Com. of the Roy. Ex. Assurance, 1 Burr. 341.

A ship was insured from London to any place beyond the Cape of Good Hope. The ship arrived in the river Canton in China, when, in order to be heeled and refitted, the sails, &c. were taken out and lodged in a bank saul, on an island in the river, (which was

was proved to be usual and beneficial to all concerned.) The underwriter was held liable for the loss of the sails by fire, while in this bank saul. For the insurer at the time of underwriting must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. What is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by such a policy, and to make a part of it as much as if it were expressed. If a ship be driven a mile on shore by a hurricane, or be burnt in a dry dock while repairing, the insurer is liable. CHAP. I. 4T. R. 265

The goods on board the ships the Hope and the Anne were insured at and from Dartmouth to Waterford; and from thence to the port or ports of discharge on the coast of Labrador, with leave to touch at Newfoundland, till the goods should be safely discharged and landed. From the time of their arrival the crew were chiefly employed in fishing, and took out their cargo only at leisure times; (which was fully proved to be the usage) and the ships were taken by a privateer before they were unloaded. The court held that the insurers were liable; for that according Noble v. Kenneway, Dougl. 510

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ing to the uſage there was no delay. Lord Mansfield. Every underwriter is preſumed to be acquainted with the practice of the trade he inſures, and, that, whether it be recently eſtabliſhed or not.

The uſage in trade has been more notorious in Eaſt India voyages than in any other; and the charter parties of the India Company give leave to prolong the ſhip's ſtay in India for a year. It is common by a new agreement to detain her a year longer; and the words of the policy are alſo very general, without limitation of time or place.

For theſe reaſons the underwriter is always held liable for any intermediate voyages on which the ſhips may be ſent while in India, though not expreſsly mentioned in the policy.

Salvada v. Hopkins, 3 Bur. 1707.

Thus, where the inſurance was "at and "from Bengal to any ports or places whatſo-"ever, in the Eaſt Indies, China, Perſia, or "elſewhere, beyond the Cape of Good Hope, "forwards and backwards, and during her "ſtay at each place, until her arrival at Lon-"don, on money, &c." and the captain, when in Bengal, entered into a new agreement for prolonging the ſhip's ſtay, (the preſident and council of Bengal finding it expedient to detain

tain the ship in India) and went several intermediate country voyages, in the last of which she was lost: the insurers were held liable.

Gregory v. Christie, B. R. Trin. 24 Geo. 3.

So also in an action upon a policy "on the "goods, specie, and effects, of the plaintiff, "on board the ship on her voyage from Lon- "don to Madras and China," with liberty to touch, stay, and trade, at any ports or places whatsoever, a similar question arose upon the following facts. When the ship arrived at Madras, she was too late to go to China that year; upon which she was employed by the council there, to go from Madras to Bengal to fetch rice, which voyage she performed once, and in attempting to perform it a second time, was lost. The jury found a verdict for the plaintiff.

On a motion for a new trial it was contended, that these intermediate voyages were not insured under the policy, for that the words "to touch, stay, and trade, at any "ports or places whatsoever," only meant to give a licence to stay at such places, as it should be necessary to stop at in the course of the voyage. Lord Mansfield said, it would narrow the construction very much indeed, to say, that the policy relates to those places only, at which they shall stop in the voyage.

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The words made uſe of certainly take in the intermediate voyage; and the uſage of trade confirms this conſtruction.

Farquharſon v. Hunter, B. R Hil. 25 Geo. 3. Park 30.

In an inſurance on a ſhip "at and from "London to Bengal, beginning the riſk upon "the ſhip at London, and ſo to continue till "the arrival of the ſaid ſhip at Madras and "Bengal, *with liberty to touch and ſtay at any "port or place in this voyage:*" the underwriters were held to be anſwerable for a loſs which happened in an intermediate voyage from Madras to Viſàgipatnam for rice, by order of the council.

The parties may by their own agreement prevent ſuch latitude of conſtruction, nor are expreſs words of excluſion neceſſary. If from the terms uſed it can be collected that ſuch was the intention of the parties, that conſtruction ſhall prevail.

Thus, where the general words were reſtrained by the expreſſions "in the outward "or homeward-bound voyage," and "in "this voyage," the court held that the policy only meant places "in the uſual courſe of the "voyage to and from the place named."

Park 52. Fletcher & another v. Poole,

Theſe equitable principles of conſtruction have never been extended ſo far as to enable an inſurer to recover damage ſuffered in a ſpecies

species of property, different from that named in the policy. Thus, under a policy upon the ships, or upon the goods, the insured cannot recover extraordinary wages paid to seamen, or provisions expended, during a detention to repair, or detention by an embargo.

Sitt. after East. 1769, before Ld. Mansfield, Guildhall, 1 T.R. 127.

Nor is the underwriter on goods liable for the freight paid by the owner to the proprietor of the ship, where the goods were partially lost.

Baillie v. Mondigliani, B. R. Hil. 25 Geo. 3.

Neither is an underwriter on ship and goods liable for the charge of demurrage. The freight and not the ship is liable for this loss.

Eden v. Poole, Sitt. after Hil. 1785.

In an insurance upon a Greenland ship, the underwriter in a policy on the ship, tackle, and furniture, &c. is not liable for the lines and tackle employed in the fishery in those seas.

Hopkins v. Pickersgill, B. R. East. 23 Geo. 3.

But provisions sent out for the use of the crew, are protected by a policy on the ship and furniture.

4 T.R. 206.

It is necessary, in order to entitle the insured to recover, that the loss which has happened, be a direct and immediate consequence of the peril insured, and not a remote one.

Park 56.

Thus, in an action on a policy to recover the value of some negroes, who perished by mutiny, which was one of the risks insured against; it was held, that the underwriters

Jones v. Schmoll, Guildhall, Trin. Vac. 1785. 1 T. R. p. 130, n. (*a*)

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were liable for all thoſe who were killed in the mutiny, or who died of their wounds: that all thoſe who died of the bruiſes which they received in the mutiny, though accompanied by other cauſes, were to be paid for by the underwriters. But they were not liable for thoſe who had ſwallowed ſalt water, and died in conſequence thereof, or who leaped into the ſea, and hung upon the ſides of the ſhip without being otherwiſe bruiſed, or who died of chagrin; all theſe having been loſt by too remote a conſequence.

See 34 Geo. 3. c. 80. ſ. 10. & 35 Geo. 3. ch. 90.*

In the conſtruction of policies of inſurance for time, which are very frequent, the ſame liberality, equity, and good ſenſe, have always prevailed, as in all other inſurances; and the courts have gone, as far as poſſible, to decide according to the intent of the parties.

Park 58.

Hence in an inſurance "at and from Liverpool to Antigua, with liberty to cruiſe "ſix weeks, and to return to Ireland, or "Falmouth, or Milford, with any prize or "prizes;" it was held, that this meant a connected portion of time, and not a deſultory cruiſing for ſix weeks at any time.

2 Burr. 1171

There are two ſorts of policies, valued, and

* See ante for an abſtract of theſe clauſes, pag. 12.

open:

open: the difference between them is, that in the former, goods or property insured are valued at prime cost, at the time of effecting the policy; in the latter, the value is not mentioned: that in the case of an open policy, the real value must be proved; in a valued policy it is agreed, and is just as if the parties had admitted it at the trial.

In a valued policy also if a part of the cargo be on board when the ship is lost, the rest being ready to be shipped, the insured may recover to the whole amount *. 3T.R. 362.

* Vide ante 21, where the same case is quoted.

CHAPTER THE SECOND.

OF THE PARTIES TO AN INSURANCE—THE IMPLIED ENGAGEMENTS OF EACH INDEPENDENT OF THE WRITTEN INSTRUMENT, VIZ.—SEA-WORTHINESS OF THE VESSEL, LEGALITY OF THE VOYAGE, AND SUBJECT MATTER OF INSURANCE—TRUTH OF REPRESENTATION, AND CONCEALMENT OF MATERIAL CIRCUMSTANCES.

CHAP. II.

6 Geo. 1. chap. 18. 8 Geo. 1. chap. 15. 11 Geo. 1. chap. 30.

TO afford an opportunity to merchants of insuring their goods and other interests in a safe and secure manner, two companies for insurance were erected, by authority of parliament, in the reign of King George the First; and in order to give to these companies the exclusive advantage of the credit that must result from the association of a set of wealthy men, all other partnerships in the business of insurance were declared void. At the same time individuals were left at full liberty to carry on this kind of commerce singly; and,

in

in fact, the greateſt part of the inſurance tranſactions of this country is done, at the preſent day, by enterpriſing individuals of the city of London, and of other large and opulent towns in the kingdom*. CHAP. II.

This prohibition of partnerſhips gave birth to ſome litigation, and the following caſe occurred in conſequence of the doubts that aroſe upon the conſtruction of the above ſtatutes.

An action was brought by an underwriter againſt a broker, to recover a ſum of money which had been paid into the hands of the defendant for the plaintiff's uſe. This money had been ſo paid by one Briſtow, as his moiety of a loſs which had happened upon a policy, underwritten by the plaintiff for himſelf and Briſtow jointly. The plaintiff had paid the whole loſs; and, therefore, brought this action. Sullivan v. Greaves, Sitt. after Eaſt. 1789. Park 8.

* The projectors of theſe companies offered 600,000l. to the Miniſtry towards the diſcharge of the arrears of the Civil Liſt, which was readily embraced; and on the 4th of May, 1720, Mr. Aiſlabie preſented a meſſage from the King, recommending the eſtabliſhment of theſe companies; in purſuance of which, the firſt of theſe acts was paſſed, empowering the King to grant his Charter, dated the 22d of June following, to erect two Companies for Inſurance.

CHAP. II.

tion. Lord Kenyon held that he could not recover.

Aſſignees of Robertſon v. Aſſignees of Tyler, 1 H. Blackſt. Rep. 379.

This deciſion was afterwards fully recognized in a determination of the court of Common Pleas.

The law then is now eſtabliſhed, that an underwriter cannot claim to himſelf benefit from any dealing in inſurance, if it be a joint or partnerſhip dealing. But if he give his ſingle ſignature to a policy, however he may intend at the time, that ſuch ſignature ſhould be for the benefit of ſome partnerſhip, he cannot get rid of an action brought againſt him by an innocent aſſurer, but will be bound by ſuch his ſingle ſubſcription. And if the credit of any company or ſociety (except the two erected as aforeſaid, and the Globe Inſurance Company ſince) be in any event pledged to a contract of this nature, the ſame is void.

Lees v. Smith, 7 T.R. 338.

This appears in the caſe of a company of ſhip owners engaged to inſure each others ſhips, although they covenanted ſeverally, and not jointly, to pay a certain ſum upon each loſs, in proportion to their reſpective ſhares; yet, as there was a clauſe providing that, in caſe of the inſolvency of any one of the members, all the others were to be reſponſible, the contract was void.

But

But if, in such an association, each individual member is only liable for the sum to which his name appears, and not for the default of the other members, it has been held by Lord Kenyon, that such an association does not infringe on the act of parliament.

CHAP. II.

Harrison v. Miller, Sitting after Hil. 1796. 7 T.R. pag. 340. not. (a)

There are clauses in a subsequent part of that statute, securing to the South Sea and East India companies, all the rights and privileges they enjoyed previous to the passing of that act, (6 Geo. 1.) and the right of lending money in bottomry, to the captains of their own ships.

The legislature having thus anxiously provided for the security of those merchants who might be desirous of carrying on an extensive trade, but who were deterred from doing so, through fear of the insolvency of underwriters, having stipulated with the company that they should have sufficient funds for the payment of all demands that might be made, and, at the same time, allowing to private underwriters the full liberty of insuring to any amount, with those who were satisfied to trust to their private securities only; it is not to be wondered at, that the business of insurance increased to a degree almost inconceivable. Indeed any person, since this statute,

Park 9.

CHAP. II. may insure as at the common law, with this single exception, that any policy subscribed by a private firm or partnership is absolutely void.

Having said thus much relative to the circumstances which render certain persons incompetent to enter into this contract, we shall now proceed to state the implied obligations which attach on both sides, taking the competency of the parties for granted.

Park 174. The least shadow of fraud, or undue concealment of facts, has been constantly held to annul and vacate policies; and both parties are equally bound to disclose circumstances within their knowledge: therefore, if the insurer, at the time he underwrites, can be proved to have known that the ship was safe arrived, the contract will be equally void as if the insured had concealed from him some accident which had befallen her.

Carter v. Boehm, 3 Burr. 1905. But there are, nevertheless, many matters as to which the insured may be innocently silent: he needs not mention what the underwriter knows, or ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter needs not be told what lessens the risk agreed, and understood to be run, by the express

expreſs terms of the policy. He needs not CHAP.
be told general topics of ſpeculation: as, for inſtance, the underwriter is bound to know every cauſe which may occaſion natural perils; as the difficulty of the voyage; the kind of ſeaſons; the probability of lightning, hurricanes, and earthquakes. He is bound to know every cauſe which may occaſion political perils; from the rupture of ſtates; from war, and the various operations of war. He is bound to know the probability of ſafety, from the continuance and return of peace; from the imbecility of the enemy, through the weakneſs of their councils, or their want of ſtrength. If an underwriter inſure private ſhips of war by ſea, and on ſhore, from ports to ports, and from places to places, any where, he needs not be told the ſecret enterprizes upon which they are deſtined: becauſe he knows ſome expedition muſt be in view; and from the nature of his contract, he waives the information, without being told. If he inſure for three years, he needs not be told any circumſtance to ſhew it may be over in two: or, if he inſure a voyage, with liberty of deviation, he needs not be told what tends to ſhew there will be no deviation. Men argue differently, from natural phænomena,

and

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and political appearances; they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both; each profeſſes to act from his own ſkill and ſagacity; and, therefore, neither needs to communicate to the other. The reaſon of the rule which obliges the parties to diſcloſe, is to prevent fraud, and encourage good faith; it is adapted to ſuch facts as vary the nature of the contract, which one privately knows, and the other is ignorant of, and has no reaſon to ſuſpect. The queſtion, therefore, muſt always be—"Whether there was, under "all the circumſtances, at the time the policy "was underwritten, a fair ſtatement, or a "concealment: fraudulent, if deſigned; or, "though not deſigned, varying materially the "object of the policy, and changing the riſk "underſtood to be run."

Shoolbred v. Nutt, Sittings at Guildhall after Hil. 1782.

Park 229.

It is a condition, or implied warranty, on the part of the aſſured, in every policy of inſurance, that the ſhip is ſea-worthy; and there need be no repreſentation of that, for, if the veſſel ſail without being ſo, the policy is void. And there is no occaſion to ſtate the condition of a ſhip or cargo at the end of her former voyage.

Every

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Every ship insured, must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect, wholly unknown to the parties, that will vacate the contract, and the insurers are discharged.

Mills & another v. Roebuck, Park 221.

But though the assured ought to know whether she was sea-worthy or not, at the time she set out on her voyage; yet, if it can be shewn that the decay to which the loss is attributable, did not commence till a period subsequent to the insurance, the underwriter will be liable, if she should be lost a few days after her departure. It was said by Lord Mansfield, that "by an implied warranty, "every ship insured must be tight, staunch, "and strong; but it is sufficient if she be so "at the time of her sailing. She may cease "to be so in twenty-four hours after her de- "parture, and yet the underwriter will cer- "tainly be liable."

Eden v. Parkinson, Dougl. 708.

However, if a ship sail upon a voyage, and in a day or two become leaky, and founder, or be obliged to return to port, without any storm, or visible or adequate cause to produce such an effect, the presumption is, that she was not sea-worthy when she sailed; and the jury, upon the plaintiff's own case, may draw such

CHAP. II. such a conclusion. We come now to consider the legality of the voyage, or subject matter of the insurance.

Park 235. An insurance upon a smuggling voyage, prohibited by the revenue laws of this country, would be void. Aliter, if merely against the revenue laws of another state; for no country pays attention to the revenue laws of another.

Do. 231. Whenever, in fact, an insurance is made on a voyage expressly prohibited by the common law, statute, or maritime law of this country, the policy is void. And with respect to the subjects of the policy, the most frequent are, ships, goods and merchandizes; and the freight, or hire of ships, having reference to marine insurances only. Cases, however, are to be found in the books, in which the subject of the insurance may be distinguished from the above descriptions.

Bottomry and respondentia, are a species of interest that may be the subject of insurance, by expressly denominating and specially describing them in the policy: for, it is to be observed, that under a general insurance on goods and merchandizes, the party insured cannot recover money lost on bottomry.

Such

Such was the determination of the court of King's Bench; and Lord Mansfield's words, on that occasion, are worthy of notice.—"It "is now established as the law and practice "of merchants, that respondentia and bot- "tomry must be specified and mentioned in "the policy of insurance."

Glover v. Black, 3 Burr. 1394

This is to be observed, that the statute 19. Geo. 2. ch. 37. sec. 5. considers the borrower of money on the respondentia contract, as having a right to insure only for the surplus value, over and above the money he has so borrowed; and that the lender alike, has a right to make insurance on the money lent; otherwise, each might insure for more than his whole interest, which would give birth to gaming policies.

Again, there are special interests, as delicate and particular even as the bottomry and respondentia contracts, upon which an insured may recover under a general insurance. For example, a factor, to whom a balance is due, may have a lien upon goods consigned to him; and this constitutes an interest, which he may insure, without specially naming it in the policy. Moreover, the usage of trade, will sometimes give validity to insurances, which

Gordon v. the London Ass. Comp. 1 Burr. 489

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which would otherwiſe, in law, be too general to embrace the particular intereſt.

Gregory v. Chriſtie, Park 11.

Lord Mansfield felt himſelf obliged to decide, on the ground of uſage, that, a captain of a ſhip, who had expended money for the ſhip's uſe, and had charged reſpondentia intereſt upon it, might recover the ſum ſo expended, and ſo charged, with intereſt, under an inſurance upon goods, ſpecie, and effects.

Park 12.

* To prevent ſeamen from deſerting their ſhips, it is now determined, that a ſailor can neither inſure his wages, nor any commodity which he is to receive at the end of the voyage in lieu of wages; yet, this regulation does not mean to prevent them inſuring thoſe wages which they are intitled to receive abroad for the voyage already performed, or goods which they have purchaſed with thoſe wages in order to bring home: for, in ſuch a caſe, they are to be conſidered in the ſame light as other men.

* By the 8 Geo. 1. chap. 24. ſec. 7. it is provided, "that no maſter or owner of any merchant ſhip ſhall "pay to any ſeaman, beyond the ſeas, any money or "effects, on account of wages, exceeding one moiety of "the wages due at the time of ſuch payment, till "ſuch ſhip ſhall return to Great-Britain or Ireland."

Upon

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Upon the same principle it was doubted, at first, whether the Governor of Fort Marlborough, in the East Indies, could insure his interest in such fort against an European enemy. But when it appeared, that though called a governor, he was really but a merchant, Lord Mansfield and the other judges agreed that such interest was legally insurable. Carter v. Boehm, 3 Burr. 1905

Upon a joint capture, by the army and navy, the officers and crews of the ships have, before condemnation, an insurable interest, by virtue of the prize act which usually passes at the commencement of a war.

So, also, the captors of ships seized as prize, have an insurable interest in them in the voyage home, for bringing them to adjudication in the Admiralty; and that, although they should not be adjudged prize. Boehm v. Bell, 8 T. R. 154.

In a very late case, where the interest was declared by the policy to be on the commission of the plaintiff, as consignee of the cargo, valued at 1500l. Lord Kenyon expressed a very strong opinion, that this was a good insurable interest; but the matter being compromised, it did not come to any decision. Flint v. Le Mesurier Sittings at Guildhall after Hil. 1796.

If a merchant abroad, who is interested in goods and the freight of a cargo, mortgage them

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them to his creditor here, for the payment of money at a certain day, and, by letter, inclosing the bills of lading, direct an insurance, he has an insurable interest, although the mortgage was become absolute before the letter, directing the insurance, was received.

Park 244. All insurances upon commodities, the importation or exportation of which is prohibited by law, are void. And this rule prevails, whether the insurer did or did not know that the subject of the insurance was a prohibited commodity*.

Park 13. There have been doubts concerning the illegality of contracts for insuring the property of enemies. The better opinion seems to be that, insurances of this kind, would be void even under the law of nations. During the present war, however, they are made illegal by the express intervention of the legislature.

Kewley v. Ryan, 2 H. Blackst. 343. An insurance, generally, upon any ship, or ships, expected from a particular place, is

* By the 28 Geo. 3. chap. 38. sec. 45., persons making insurance on wool, &c. are liable to a fine of 50l. for the first offence, and six months solitary imprisonment. The same penalty is imposed on the insured, besides making the insurance void.

There are many other severe penalties, by different statutes, for importing certain prohibited goods.

valid;

valid; and the insured has a right to cover any ship he may think proper, that falls within the terms of it. CHAP. II.

Goods lashed on deck, ship's provisions, and captain's clothes, are not within a general policy on goods. Ante, p. 11, Ross v. Thwaite.

With regard to the doctrine of representations, we may premise, generally, that in treating of this subject, we always allude to statements not forming a part of the written instrument, but collateral and independent.

We may add, that when a statement varies the risk, and it appears that an insurer would have calculated his premium differently, had he known the truth, this becomes a misrepresentation, and will be fatal to the policy.

Wherever there has been an allegation of falsehood, a concealment of material circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself, who is interested, or of his agent; for, in either case, the contract is founded in deception, and the policy, consequently, void. Park 208.

This rule prevails, even although the act cannot be at all traced to the owner of the property insured. Nay, if a broker conceals Shirley v. Wilkinson, Dougl. 293.

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any thing material, though the only ground for not mentioning it ſhould be, that the fact concealed appeared immaterial to him, yet, this will avoid the policy.

Macdowall v. Frazer, Dougl. 247.

The like, alſo, if the concealment happen by miſtake. Thus, in a policy on a ſhip from New York to Philadelphia, the broker repreſented to the inſurer, that the ſhip was ſeen ſafe in the Delaware, on the 11th of December, by a ſhip which arrived at New York; whereas, in fact, the ſhip was loſt on the 9th of December: although there was no ſuſpicion of fraud, the policy was held to be void.

Barber v. Fletcher, Dougl. 292.

The thing concealed muſt be ſome fact, not a mere ſpeculation or expectation of the inſured. For where a broker, inſuring ſeveral veſſels, ſpeaking of them all, ſaid which veſſels are expected to leave the coaſt of Africa in November or December, the policy was held good, notwithſtanding the ſhip in queſtion had failed in May preceding.

Steward v. Dunlop, Park 209.

A curious caſe, on this ſubject, is ſtated by Mr. Park. A man knowing of the loſs of a ſhip inſured, and having arrived at Greenock, meets an intimate friend of the inſured, and a partner with him in ſome other tranſactions, communicates the intelligence of the loſs to him,

him, *who deſired it might be concealed.* The perſon receiving the account, held a converſation the ſame day with the plaintiff's clerk, who, notwithſtanding that, ſwore that he had no information from him reſpecting the ſhip, nor did he get any hint from him, further than the ſaid perſon *aſking the deponent, if he knew whether there was any inſurance made upon her, and if there was any account of her?* The ſame day the plaintiff deſired his clerk to write to get an inſurance effected, which he did, without telling his maſter of this converſation. The policy was held to be void in the Court of Seſſion, in Scotland; and the Houſe of Lords confirmed the decree. CHAP

A policy was held to be void, when goods were inſured as the property of an ally, when, in fact, they were the goods of an enemy. Skin. 327.

In another caſe, a letter being received, ſtating that a ſhip ſailed from Jamaica for London on the 24th of November, after which the agent told the inſurer that ſhe ſailed the latter end of December; the policy was declared void. Roberts v. Fonnereau, Park 176.

The inſured having warranted the ſhip and goods to be neutral, in an inſurance upon goods and merchandizes, and it was expreſsly found by the jury that they were not neutral, Woolmer v. Muilman, 3 Burr. 1421. 1 Black. 427.

HAP. II. Lord Mansfield, and the reſt of the court, were of opinion, that it was too clear a caſe to bear an argument. They declared, therefore, that the inſured could not recover, though the loſs happened by ſtorms, and not by capture; for there was a falſehood in reſpect of the character and nature of the thing inſured; and, in truth, no contract.

ark 177. In the caſe of Fernandez againſt Da Coſta, goods were inſured on board a ſhip, warranted Portugueſe; but, in fact, the ſhip was not Portugueſe. Here, although the cargo was ſpoiled by her putting into a French port, on account of perils of the ſeas, where ſhe was condemned as not being Portugueſe; yet, that fact was held to vitiate the policy, *ab initio*, although the goods were loſt by a different peril.

)a Coſta v. ieandrett, 1 P. Wms. 170. One having a doubtful account that a ſhip, deſcribed like his, was taken, inſured her without giving any notice to the inſurers of what he had heard. The policy was decreed by Lord Chancellor Macclesfield to be delivered up.

Seaman v. [illegible], 2 Str. 1183. In another caſe it appeared, that the agent for the plaintiff, two days before he effected the policy, received a letter from Cowes, wherein it is ſaid, "On the 12th of this "month

" month I was in company with the Davy (the " ſhip in queſtion) at twelve at night, loſt ſight " of her all at once; the captain ſpoke to me " the day before that he was leaky: and the " next day we had a hard gale." The ſhip however continued her voyage, and was captured by the Spaniards. CHAP.

Lord Chief Juſtice Lee thought it a ſtrong caſe for the defendant, and the jury found accordingly.

A ſhip was inſured, " at and from Genoa." The ſhip loaded at Leghorn, being originally bound for Dublin; but loſing her convoy, ſhe put into Genoa in Auguſt, where ſhe lay till January following. All theſe facts were known to the inſured, but not communicated by him when he effected the policy. It was therefore held to be void. Hodgſon Richardſ. 1 Blackſt Rep. 463

A ſhip had been ſent out to trade on the coaſt of Africa, with directions to proceed from thence to the Britiſh Weſt Indies, and to ſtop at Barbadoes, if ſhe could get a ſale,— if not, to proceed to Montego Bay. She ſailed from St. Thomas on the coaſt of Africa on the 2d of October, a circumſtance known to the plaintiff by letter received in February. The policy was not made till the 21ſt of March, and the letter was not ſhewn, nor was any Ratcliffe Snowdhred Park 180

CHAP. II. thing ſaid of her ſailing from St. Thomas; but in the inſtructions "the above ſhip was on the "coaſt the 2d of October." The jury found for the defendant, agreeably to Lord Manſfield's direction.

Iſs v. atton, rk 181.

The broker's inſtructions ſtated the ſhip ready to ſail on the 24th of December; he repreſented to the underwriters that the ſhip was in port, when in fact ſhe had ſailed the 28th of December. Lord Mansfield ſaid, "that this "was a material concealment and miſrepre-"ſentation;" and the jury found for the defendant.

The following caſe is of a more delicate nature, and therefore muſt be ſet out more fully.

mehe v. ſcher, ngl. 238.

A ſhip was inſured from London and Ramſgate to Nantz, with liberty to call at Oſtend, being a general ſhip in the port of London for Nantz. The ſhip's clearances and papers were all made out for Oſtend; but ſhe was never intended to go thither. War was declared againſt France after the poli was made. Two defences were ſet up to an action brought on the policy. 1ſt. That there was a fraud in clearing out the ſhip for Oſtend, when ſhe never was deſigned to go there. 2d. That as hoſtilities were declared after the policy was ſigned, and before the ſhip ſailed, the defend-

ant

ant ought to have had notice. The court held that neither of the objections was valid; for, as to the first, it was the common usage; and the insurer was bound to take notice of the second. CHAP. II.

A decision of a similar kind occurs in the following case.

The ship being Portuguese was condemned for having an English supercargo on board, and the underwriter refused to pay because the insured had not disclosed this latter circumstance. The court held that the condemnation was unjust; and that the circumstance was not such as the insured was bound to disclose, unless he knew of an edict of any country, that any ship having such supercargo should be condemned as lawful prize. Mayne v. Walter, Park 195.

It is sufficient if a representation be substantially performed, and a false statement will avoid the policy as a fraud, but not as part of the agreement. Even written instructions, if they are not inserted in the policy, are only to be considered as representations; and in order to make them valid and binding as a warranty, it is necessary that they form a part of the written instrument. A misrepresentation of any material point avoids the policy, because the underwriter will have computed the risk upon circumstances that did not exist. Park 196.

CHAP. II.

Pawſon v. Watſon, Cowp. 785.

This was an action on a policy of inſurance, and the following inſtructions were ſhewn to the firſt underwriter, but not inſerted in the policy. "Three thouſand five hundred pounds "upon the ſhip Julius Cæſar, for Halifax, to "touch at Plymouth, and any port in Ame-"rica; ſhe mounts twelve guns and twenty "men." Theſe were not ſhewn to the preſent defendant; but ſhe was repreſented generally as a ſhip of force. At the time of her being taken ſhe had on board ſix four-pounders, four three-pounders, three one-pounders, ſix half-pounders, which are called ſwivels, and twenty-ſeven men and boys in all, of whom ſixteen only were men. The witneſs ſaid he conſidered her as being ſtronger with this force, than if ſhe had twelve carriage guns and twenty men; and that there were neither men nor guns on board at the time of the inſurance. The court held that theſe inſtructions were only repreſentation, and that they had been ſubſtantially performed.

Bize v. Fletcher, Dougl. 272.

The ſhip Carnatic, Eaſt Indiaman, was inſured "at and from port L'Orient to the iſles "of France and Bourbon, and to all or any "ports or places, where and whatſoever, in the "Eaſt Indies, China, Perſia, or elſewhere, be-"yond the Cape of Good Hope, from place to "place;

" place; and during the ſhip's ſtay and trade, " backwards and forwards, at all parts and " places, and until her ſafe arrival back at her " laſt port of diſcharge in France." At the time this policy was ſubſcribed, there was a ſlip of paper wafered to it, and ſhewn to the underwriters, on which the following repreſentation was written: " The ſhip has had a " complete repair, and is now a fine and good " veſſel, three decks. Intends to ſail in Sep- " tember or October next. Is to go to Ma- " deira, the iſles of France, Pondicherry, " China, the iſles of France and L'Orient."

The ſhip in fact did not ſail till the 6th of December, and did not reach Pondicherry till the month of July following. She continued there till Auguſt; when, inſtead of proceeding to China, ſhe ſailed for Bengal, where ſhe paſſed the winter, and underwent conſiderable repairs. She returned to Pondicherry, and, after taking in a homeward-bound cargo at that place, proceeded on her voyage back to L'Orient, but was taken by the Mentorprivateer. The uſual time for the direct voyage between Pondicherry and Bengal is ſix or ſeven days; but this ſhip was ſix weeks in going to, and two months in returning from, Bengal; and lay off Madras, Maſulipatam, Viſigapatam, and Ya-

AP. II. non, and took in goods at all thoſe places. Lord Mansfield told the jury, that if no fraud was intended, and that the variance between the intended voyage, as deſcribed in the ſlip of paper, and the actual voyage as performed, did not tend to increaſe the riſk, this ſlip of paper being only a repreſentation, the plaintiff was intitled to their verdict. Verdict accordingly.

CHAPTER

CHAPTER THE THIRD.

OF RE-ASSURANCE—THE NATURE OF IT—WHEREIN ALLOWED, AND IN WHAT CASES PROHIBITED BY ACT OF PARLIAMENT.

RE-ASSURANCE is a contract which the person first insuring enters into, to relieve himself from the risks which he has incautiously undertaken, by throwing them upon other underwriters, who are called re-assurers. CHAP. III. Park 276, 277.

The first contract is not at all affected by a re-assurance, as the re-insurer is not connected with the original owner of the property insured. The risks of the insurer only form the object of the re-insurance.

However fair and reasonable such a contract may seem, yet it was so much abused, destroying those very benefits it was originally intended to promote, that the legislature interfered; and, by a positive law, cut off all opportunities of further fraud.

By the 19th Geo. II. chap. 37. s. 4. it was enacted, "That it should not be lawful to "make re-assurance, unless the assurer should

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" be inſolvent, become a bankrupt, or die; in " either of which caſes, ſuch aſſurer, his exe- " cutor, adminiſtrators, or aſſigns, might " make re-aſſurance to the amount before by " him aſſured, provided it ſhould be expreſſed " in the policy to be a re-aſſurance."

Thus all the advantages that could be derived from an unlimited re-aſſurance are preſerved, and individuals are only reſtrained from turning it to purpoſes of a deſtructive or pernicious tendency to a commercial nation.

In caſe of inſolvency or bankruptcy, the creditors, as well as the individual, derive a mutual advantage from re-aſſurance, as the bankrupt's eſtate is not diminiſhed, in caſe of loſs; and there is a better ſecurity to the inſured for payment of his damage, or at leaſt a proportion of it.

It may not be altogether irrelevant here to obſerve, that if an underwriter became bankrupt before a loſs, the inſured was not intitled to a dividend before the following ſtatute was paſſed. But now, after reciting

19 Geo 2. ch. 32. ſ. 2.

" that merchants and traders frequently lend " money on bottomry, or at reſpondentia, " and in the courſe of their trade frequently " cauſe their ſhips or veſſels, and the goods " and merchandizes loaded thereon, to be in- " ſured;

" ſured; and that where commiſſions of bank-
" ruptcy have iſſued againſt the obligor in ſuch
" bottomry or reſpondentia bond, or the under-
" writer or aſſurer in ſuch inſurance, before
" the loſs of the ſhip for goods in ſuch bond or
" policy of inſurance mentioned had happened,
" it had been made a queſtion, whether the
" obligee or obligees in ſuch bond, or the aſ-
" ſured in ſuch policy of inſurance, ſhould be
" let in to prove their debts, or be admitted to
" have any benefit or dividend under ſuch
" commiſſion, which might be a diſcourage-
" ment to trade." It was therefore enacted,
" that the obligee in any bottomry or reſpon-
" dentia bond, and the aſſured in any policy of
" inſurance, made and entered into upon a
" good and valuable conſideration, bona fide,
" ſhould be admitted to claim; and after the
" loſs or contingency ſhould have happened,
" to prove his, her, or their debt and demands,
" in reſpect of ſuch bond or policy of inſur-
" ance, in like manner as if the loſs or contin-
" gency had happened before the time of the
" iſſuing of ſuch commiſſion of bankruptcy
" againſt ſuch obligor or inſurer; and ſhould
" be intitled unto, and ſhould have and receive
" a proportionable part, ſhare, and dividend,
" of ſuch bankrupt's eſtate, in proportion to

" the

CHAP. III. "the other creditors of ſuch bankrupt, in like "manner as if ſuch loſs or contingency had "happened before ſuch commiſſion iſſued; "and that all and every perſon and perſons, "againſt whom any commiſſion of bankruptcy "ſhould be awarded, ſhould be diſcharged of "and from the debt or debts owing by him, "her, or them, on every ſuch bond and policy "of inſurance as aforeſaid, and ſhould have "the benefit of the ſeveral ſtatutes now in "force againſt bankrupts, in like manner "to all intents and purpoſes as if ſuch loſs "or contingency had happened, and the mo-"ney due in reſpect thereof had become pay-"able, before the time of the iſſuing out the "commiſſion."[2]

Park 278. Re-aſſurance is no leſs neceſſary and beneficial in caſe an inſurer die, becauſe it will provide aſſets to ſatisfy the inſured in caſe of a loſs; and thus ſecure the eſtate of the deceaſed for the benefit of his repreſentatives.

Notwithſtanding the act is worded in ſuch expreſs terms, yet as it had been held that the firſt clauſe prohibiting inſurances, *intereſt or no intereſt*, did not extend to foreign ſhips, ſo it was urged, that re-aſſurance made here on the ſhips of foreigners did not fall within its meaning.

CHAP. III.

Andree v. Fletcher, 2 T.R. 161.

The defendant made a re-assurance on a French vessel first insured at Marseilles by a French underwriter then living, who, at the time of subscribing the second policy, was solvent.

The court were unanimously of opinion that this re-assurance was void; and that every re-assurance in this country, either by British subjects or foreigners, on British or foreign ships, is void by the statute, *unless the first assurer be insolvent, become a bankrupt, or die.*

In France, Koningsberg, Hamburgh, and Bilboa, re-assurances are allowed to be effected without any such restraints; and in truth this species of contract has obtained a place in most of the commercial systems of the trading powers of Europe.

CHAPTER

CHAPTER THE FOURTH.

OF DOUBLE INSURANCE—ITS LEGAL OPERATION—IN WHAT RESPECTS DIFFERENT FROM RE-ASSURANCE—RELATIVE SITUATIONS OF THE PARTIES THERETO, BEFORE AND AFTER VERDICT.

CHAP. IV.

A DOUBLE insurance, which is ſometimes confounded with re-aſſurance, is where the ſame man makes two inſurances on the ſame goods, or the ſame ſhip; and, by reaſon thereof, is to receive two ſums inſtead of one, or the ſame ſum twice over, for the ſame loſs.

1 Burr. 496.

There are two material diſtinctions between re-aſſurance and double inſurance: the firſt is, that a re-aſſurance is a contract made by the firſt underwriter, his executors, or aſſigns, to ſecure himſelf or his eſtate; a double inſurance, is entered into by the inſured. Secondly, in all caſes, except thoſe provided for by the ſtatute 19 Geo. 2. chap. 37. ſec. 4. re-aſſurances are abſolutely void: a double inſurance is not void; yet, the inſured ſhall recover

1 Blackſt. Rep. 416. Park 281.

recover only one satisfaction for his loss. Where a man has made a double insurance, he may recover the amount of his loss, against which of the underwriters he pleases, but he can recover for no more. An insurance being a contract of indemnity, in case of loss, it follows, as a necessary consequence, that a man shall not recover more than he has lost.

1 Burr. 492.

It was ruled by Lord Mansfield, in the year 1763, and agreed to be the course of practice, that upon a double insurance, though the insured is not intitled to two satisfactions, yet, upon the first action, he may recover the whole sum insured; and may leave the defendant therein to recover a rateable satisfaction from the other insurers.

Newby v. Read, 1 Blackst. Rep. 416.

So, also, in an action on a policy of insurance on a ship from Newfoundland to Dominica, and from thence to the port of discharge in the West Indies. This was a valued policy on the ship and frieght; and on goods as interest should appear. The ship sailed from St. John's the 17th of December 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200l. and paid into court 124l. on a supposition that the underwriter, on a former policy, should bear a share of the loss. The plaintiff had originally

Rogers v. Davis, Sittings in Mich. Vac. 17 Geo. 3. before Ld. Mansfield.

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nally insured at Liverpool, on a voyage from Newfoundland to Barbadoes and the Leeward Islands, with an exception of American captures; but the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was intitled to receive the full amount of his insurance against the defendant, and not to any part from the Liverpool underwriters; because the voyage, now insured, was different from that insured at Liverpool. There was, however, a verdict for the plaintiff for his full demand, with liberty for the defendant to bring an action against the Liverpool underwriters, if he thought fit.

Davis v. Gildart, Sittings in East. Vac. 17 Geo. 3. at Guildhall

Accordingly, in Easter Term following, an action was brought for money had and received, to the plaintiff's use, who was defendant in the last cause, in order to recover a contribution for the loss which the plaintiff had been obliged to pay. Both parties agreed to admit, that on the London policy, 2,200l. were insured: that on the two Liverpool policies, 1,700l. were insured: that the merchant was interested to the amount of 500l. on the ship, 300l. on the freight, and 1,400l.

on

on the cargo. That the plaintiff had paid 200l. loſs, and 47l. for the coſts. The queſtion was, whether the defendant was liable to contribute any thing, and what? CHAP. IV.

The whole intereſt was 2,200l.; and the whole inſurance was 3,900l. It was inſiſted by the counſel for the defendant, that the inſurance in London was an illegal re-aſſurance; and, therefore, the plaintiff might have made a good defence in an action brought againſt him; and if ſo, he could not now recover againſt the defendant.

Lord Mansfield.—The queſtion ſeems to be, whether the inſured has not two ſecurities for the loſs that has happened? If ſo, can there be a doubt that he may bring his action againſt either? It is like the caſe of two ſecurities; where, if all the money be recovered againſt one of them, he may recover a proportion from the other. Then this would bring it to the queſtion, whether the ſecond inſurance is void as a re-aſſurance. But a re-aſſurance is a contract made by the inſurer to ſecure himſelf; and this is only a double inſurance.

Another ground was taken in the cauſe, which is not material to be mentioned here; but,

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but, upon this direction, the plaintiff had a verdict.

Godin and others v. the London Aff. Com. 1 Burr. 489. 1 Blackft. Rep. 103.

Although a man, by making a double inſurance, ſhall not be allowed to recover a double ſatisfaction for the ſame loſs; yet, various perſons may inſure various intereſts on the ſame thing, and each to the whole value, (as the maſter for wages, the owner for freight; one perſon for goods, another for bottomry); and ſuch contract does not fall within the meaning of a double inſurance.

Upon the whole, therefore, we find, that the eſſential property of double inſurance is, that before action, or verdict, the aſſured may proceed on which policy he pleaſes for the whole amount of the loſs; and that the defendant, in ſuch action, may recover, *pro rata*, againſt the other inſurer. For, if the inſured is to recover but one ſatisfaction, (inſurance being conſidered nearly as an indemnity in caſe of a loſs), natural juſtice ſays, that the ſeveral inſurers ſhall, all of them, contribute to ſatisfy that loſs againſt which they have all inſured.

CHAPTER

CHAPTER THE FIFTH.

OF VOID POLICIES—ABSOLUTELY VOID IN THE FIRST INSTANCE, AS BY FRAUD, CONCEALMENT OR MISREPRESENTATION OF THE INSURER—OF THE INSURED, BY RE-ASSURING, EXCEPT ACCORDING TO ACT OF PARLIAMENT—WANT OF INTEREST IN THE SHIP OR THING INSURED—THAT BECOME VOID BY ACT OF THE PARTIES, VIZ. —CARRYING PROHIBITED GOODS, GOING ON AN ILLEGAL VOYAGE, NON-COMPLIANCE WITH WARRANTY, DEVIATION OR CHANGING THE SHIP—SAILING IN A BOTTOM NOT FIT FOR THE VOYAGE—NOT SEAWORTHY—IN WHICH OF THESE CASES THE PREMIUM IS TO BE RETURNED.

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IT has been before remarked, that marine policies, though not ranked with deeds of ſpecialty, not being under ſeal, yet, have always been conſidered as of the higheſt credit, and as containing engagements of the moſt ſacred nature. That the agreement was to ſave commercial adventurers from deſtruction

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tion by ſudden loſſes, by inſuring agai perils riſked; and, therefore, termed tract of indemnity, in which the pure faith on each ſide was required.

Any ſort of fraud*, any material c ment or miſrepreſentation of either parties, whether intentional or uninter by deſign or miſtake, will, therefore, this contract completely void, as the terms of it are not ſtated and equally ſtood by both parties.

It is not thought neceſſary to go o whole of the caſes relative to fraud, c ment, or miſrepreſentation of the inſu inſured, as theſe have already been qu the ſecond chapter of this work; but ſ them may not be improperly introdu this place.

Steward v. Dunlop, ante 50.

A man having arrived at Greenoc knowing of the loſs of a ſhip inſured,

1 Ann, ſt. 2. ch. 9, ſec. 4.

* Although the law has not affixed any pun to fraud in this ſpecies of contract, yet, by ſt is made felony for any captain, maſter, mariner, officer, to wilfully caſt away, burn, or deſtroy a

4 Geo. I.

to which they belong, or procure the ſam e to be c the prejudice of the owners, merchants, or under to any policies thereon.

11 Geo. I. chap. 29.

A ſubſequent ſtatute takes away the benefit of from this offence.

an intimate friend of the assured, his partner in some other transactions, and informs him of the loss, who desired it might be concealed. The person receiving the account held a conversation the same day with the plaintiff's clerk, who, notwithstanding that, swore that he had no information from him respecting the ship, nor did he get any hint, further than the said person asking the deponent if he knew whether there was any insurance made upon her, and if there was any account of her? The same day the plaintiff desired his clerk to write to get an insurance effected, which he did, without telling his master of this conversation. The policy was held to be void in the Court of Session in Scotland; and the decree was confirmed in the House of Lords.

A letter being received, stating, that a ship sailed from Jamaica for London, on the 24th of November, after which the agent told the insurer that she sailed the latter end of December; the policy was declared void.

Roberts v. Fonnereau, Park 176. ante 51.

The ship was stated to be ready to sail December 24th by the broker's instructions. He represented the ship to be in port, when, in fact, she had sailed. Lord Mansfield held that this was a material concealment and misre-

Fillis v. Brutton, Park 182. ante 52.

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misrepresentation, and the jury, accordingly, found for the defendant.

Carter v. Boehm, 3 Burr. 1905 quoted ante 47, for another purpose.

Yet, there are many matters as to which the insured may be innocently silent: first, as to what the insurer knows, however he came by that knowledge; secondly, as to what he ought to know; thirdly, as to what lessens the risk.

Fitzherbert v. Mather, 1 T. R. 12.

The plaintiff's agent, Thomas, shipped goods for the plaintiff, and wrote to the agent for the plaintiff in town to get an insurance effected. The letter was dated September 16th, and contained this sentence:—"I, this "day, shipped on board the Joseph, which "sailed immediately, a cargo of oats, &c." About six or seven o'clock of the evening of the same day, Thomas heard a report that the ship was on shore; and, at six o'clock in the morning of the 17th, he knew the ship was lost. The letter did not go from Hartland till one o'clock in the afternoon of the 17th. On account of the fraud in Thomas, the policy was held void.

19 Geo. 2. c. 37. s. 4.

Every species of re assurance is void by act of parliament, "unless the assurer shall be "insolvent, become a bankrupt, or die."

Andree v. Fletcher,

And in the case cited in the margin, the court held, that the act extended to every re-

assurance

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assurance in this country, either by British subjects or foreigners, on British or foreign ships.

2 T.R. 161. ante 63.

By the statute 19 Geo. 2. chap. 37. it is enacted, that insurances made on ships or goods, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer, shall be void. But sec. 2. contains an exception for insurances on private ships of war, fitted out solely to cruize against the King's enemies; and sec. 3. on any merchandizes or effects, from any ports or places in Europe, or America, belonging to the crown of Spain or Portugal.

It has been frequently holden, that the statute does not extend to insurances of foreign ships or foreign property. Neither has a valued policy been ever holden to be a wager policy, for the insured must prove some interest, although he need not prove the whole value. But a valued policy would be void, if it were merely used as a colour for gaming.

Thellusson v. Fletcher, Dougl. 301.

Lewis v. Rucker, 2 Burr. 1167

Grant v. Parkinson, Park 267.

Whenever the court can see upon the face of the policy, that it is merely a contract for gaming, and that indemnity is not the object in view, they are bound to declare the policy void.

Da Costa v. Frith, 4 Bur. 1960.

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Lowry v. Bourdieu, Dougl. 468.

As where by the policy, it appeared that the plaintiff had lent 2500l. on bond to the captain of an East Indiaman, to which amount the ship and cargo were insured, and that, in case of loss, no other proof of interest was to be required than the exhibition of the bond; the court held that the contract was void.

Kent v. Bird Cowp. 585.

And where the defendant, in consideration of 20l. paid by the plaintiff, undertook that the ship should save her passage to China that season, or that he would pay 1000l. within a month after her arrival in the river Thames; the contract was deemed void, although the plaintiff had *some* goods on board.

Affievedo v. Cambridge, 1 Mod. 77.

In the reign of Queen Anne, such insurances were declared from the Bench to have been formerly bad; for, if one had no interest, though the policy ran interest or no interest, the insurance was void; because insurances were made for the benefit of trade, and not that persons unconcerned therein, or unInterested in the subject matter, should profit by them.

As the act of parliament has now completely settled this subject, it is unnecessary to go over any of the old cases.

Park 232.

Whenever an insurance is made on a voyage expressly prohibited by the common law, statute

statute or maritime law of the country, the policy is void. The principle upon which this regulation is founded, is not peculiar to the contract of insurance: for it is nothing more than what vitiates all contracts whatever, to act in direct opposition to the law of the land.

In an action on a policy of insurance on goods on board the ship Venus, "lost or not "lost, at and from London to New York, "warranted to depart with convoy from the "Channel for the voyage." The ship had provisions on board, which she had a licence to carry to New York, under a provision in the prohibitory act of 16 Geo. 3. chap. 5. But one half of the cargo, including the goods which were the subject of this insurance, was not licensed. There had been a proclamation by Sir William Howe, to allow the entry of unlicensed goods at New York; but he had no authority under the act of parliament to issue such proclamation, or to permit the exportation of unlicensed goods. The first section of the statute prohibits all commerce with the province of New York (amongst others) and confiscates all ships and their cargoes which shall be found trading, going to trade, or coming from trading, with

Johnson v. Sutton, Dougl. 241.

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the provinces; and by the next ſection, goods not licenſed, found on board ſuch ſhips, ſhall be forfeited.

The court held, that if the defendant did not know that the goods were unlicenſed, the objection was fair as between the parties: if he did, he would not deſerve to be favoured. But, however that might be, it was illegal to ſend the goods to New York; and "*in pari delicto, potior eſt conditio defendentis.*"

Delmada v. Motteux, B. R. Mic. 25 Geo. 3. Park 234.

If a ſhip, though neutral, be inſured on a voyage prohibited by an embargo, ſuch an inſurance is void.

Wilſon v. Marryat, 8 T. R. 31.

If in the commencement of one entire voyage, there be any thing illegal, and an inſurance be effected on the latter part of the voyage, which, taken by itſelf, would be legal, ſuch illegal commencement will vitiate the whole, and the aſſured cannot recover upon the policy.

Planche v. Fletcher, Dougl. 258.

Though an inſurance upon a ſmuggling voyage, prohibited by the revenue laws of this country, would be void: yet, the rule has never been ſuppoſed to reach thoſe caſes, where ſhips have traded contrary to the revenue laws of foreign ſtates; becauſe no country takes notice of the revenue laws of another.

All

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All inſurances upon a voyage generally prohibited by law, ſuch as to an enemy's garriſon, or upon a voyage directly contrary to an expreſs act of parliament, or to royal proclamation in time of war, are abſolutely null and void. Park 234.

Potts v. Bell and others, 8 T.R. 548

This was a caſe on a writ of error from the Court of Common Pleas. It appeared that the ſhip Elizabeth was a neutral ſhip, and inſured from Rotterdam to Hull, having goods on board for the plaintiffs below. That hoſtilities had commenced between Great-Britain and the United Provinces previous to the purchaſe and ſhipping of the goods, or effecting the ſaid policy; whereupon, the counſel for the plaintiff in error contended that the plaintiffs below were not intitled to recover; for it is not lawful for Britiſh ſubjects to carry on trade with any nation which, at the time, is in a ſtate of open war with Great-Britain; nor to purchaſe any goods in ſuch nation, and import them from thence to Great-Britain. After two arguments, the latter by Civilians, Lord Kenyon ſaid, "that the reaſons which had been "urged by the King's advocate, (Sir John "Nicholl,) and the authorities he had cited, "were ſo many, ſo uniform, and ſo concluſive

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"to shew that a British subject's trading with "an enemy was illegal, that the question "might be considered as finally at rest. That "those authorities, it was true, were mostly "drawn from the decisions of the Admiralty "Courts; and that, after all the diligence "which had been used, there was only one "direct authority on the subject to be found "in the common law books, and that one "was to the same effect. But the circum-"stance of there being that single case only, "was strong to shew, that the point had not "been since disputed; and that it might now "be taken for granted that it was a principle "of the common law, that trading with an "enemy, without the King's license, was illegal "in British subjects." Judgment reversed.

Brandon v. Nesbitt, 6 T.R. 23. Bristow v. Towers, Do. 33. Park 244.

No insurance can be legally made on an enemy's property.

All insurances upon commodities, the importation or exportation of which is prohibited by law, are void. And this rule prevails, whether the insurer did or did not know that the subject of the insurance was a prohibited commodity.

The statute 4th and 5th of William and Mary, chap. 15. sec. 14, 15, 16. inflicts a penalty of 500l. on any persons who, by way of

of inſurance, ſhall procure the importation of prohibited goods; and a like penalty on the inſured. CH.

By the 8th and 9th William 3. chap. 36. ſec. 1. the importation of any foreign alamodes or luteſtrings, by way of inſurance or otherwiſe, without paying the duties, is expreſsly prohibited.

The 28th Geo. 3. chap. 36. ſec. 45. enacts, that perſons making inſurances on wool, &c. are liable, for the firſt offence, to a fine of 50l. and ſix months ſolitary impriſonment. The like penalty is impoſed on the inſured; and the inſurance is void.

In this chapter we have hitherto noticed ſuch policies, merely, as are abſolutely void in the firſt inſtance—which never, in fact, had any binding authority. We come now to the conſideration of thoſe which, though valid at the time of the contract made between the parties, become void by reaſon of ſome improper act committed by one of them afterwards, viz.—either by not complying with the warranty contained in the policy; deviating from the courſe of the voyage inſured; changing the ſhip, or ſailing in one not fit for the voyage—not ſea-worthy.

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A warranty in a policy of insurance, is a condition, or a contingency, that a certain thing shall be done or happen; and unless that shall be performed, the contract will not be valid. It is quite immaterial for what purpose the warranty may be introduced; but, being inserted, it becomes a binding condition upon the insured, and he must shew a literal compliance with it.

4 T.R. 345 and 6.

The very meaning of a warranty is to preclude all inquiries into the materiality, or the substantial performance of it. In this respect it differs greatly from representation, as appears from chapter second.

Cowp. 607.

It is immaterial whether a loss happen in consequence of a breach of warranty or not, or to what cause a non-compliance is to be attributed; in either case the policy is avoided.

Blackhurst v. Cockell, 3 T.R. 360.

In an action on a policy on goods, dated 9th December, 1784—*lost or not lost, warranted well this 9th day of December*, 1784: it appeared that the warranty was at the foot of the policy, which was underwritten between the hours of one and three in the afternoon of the 9th of December: that the ship was well at six o'clock in the morning, but was lost at eight, two hours after.

On

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On a motion to set aside a non-suit which had been entered, the court was clearly of opinion that the warranty had been sufficiently complied with if the ship were well at any time that day.

Cowp. 790.

In order to make written instructions binding as a warranty, they must appear on the face of the policy, and make part of it; for a paper, wrapt up therein, or even wafered to it, when the policy is shewn to the underwriters at the time of subscribing, is to be considered only as a representation.

Dougl. 12. in the notes.

But a warranty written in the margin of the policy, or transversely, is considered to be equally binding, and subject to the same strictness of construction, as if written in the body of it.

Bean v. Stewart, Dougl. 11. Kenyon v. Berthon, Dougl. 12. note 4.

Or, if a policy refer to certain printed proposals, they will be considered as part of it.

Worsley v. Wood in error, 6 T R 710. Routledge v. Burrell, 1 H. Black. 254.

In this case, which came before the court on a special verdict, the verdict, after reciting two memorandums, not material, then proceeded to state, that in the margin of the said policy were written the words and figures following: "Sailed from Liverpool, with 14 six-"pounders, swivels, small arms, and 50 hands "or upwards, copper sheathed." The ship sailed from Liverpool with only 46 hands

De Hahn v. Harvey, 1 T.R. 343.

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on board, and in ſix hours arrived at Beaumaris, in the Iſle of Angleſea, where ſhe took in ſix hands more for the voyage.

Lord Mansfield.—"There is a material "diſtinction between a warranty and a re- "preſentation. A repreſentation may be equi- "tably and ſubſtantially anſwered; but a "warranty muſt be ſtrictly complied with. "Suppoſing a warranty to ſail on the firſt of "Auguſt, and the ſhip did not ſail till the "ſecond, the warranty would not be com- "plied with. A warranty in a policy of in- "ſurance, is a condition, or a contingency, "and unleſs that is performed, there is no "contract. It is perfectly immaterial for "what purpoſe a warranty is introduced; "but, being inſerted, the contract does not "exiſt unleſs it is literally complied with. "Now, in the preſent caſe, the condition "was, the ſailing of the ſhip with a certain "number of men; which not being complied "with, the policy is of no effect."

Hone v. Whitmore, Cowp. 784.

If a man warrant to ſail on a particular day, and be guilty of a breach of that warranty, though the ſhip be delayed for the beſt and wiſeſt reaſons, or even though ſhe be detained by force, the inſurer is diſcharged from his contract, and no longer anſwerable.

Thus,

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Thus, a ſhip was inſured at and from Jamaica to London, warranted to ſail on or before the 26th of July. It appeared ſhe was ready to ſail, and would have ſailed, on the 25th, if ſhe had not been reſtrained by the order and command of Sir Baſil Keith, governor of Jamaica, and detained beyond the day. The court held that the inſurer was diſcharged.

So if a warranty be to ſail after a day ſpecified, and the ſhip ſail before, the policy is equally avoided as in the former caſe. Vezian v. Grant, Guildhall. Eaſt. Vac. 1779.

But upon a warranty to ſail, on or before a particular day, if the ſhip ſailed before the day, from her port of loading, with all her clearances on board, to the uſual place of rendezvous, merely for the ſake of joining convoy, it is a compliance with the warranty, though ſhe be afterwards detained there by an embargo beyond the day. If her cargo was not complete, it would not be a commencement of the voyage.

The ſhip Capel being inſured at and from Jamaica to London, warranted to have ſailed on or before the firſt of Auguſt, was completely laden for her voyage to England, at St. Ann's in Jamaica, and ſailed from thence on the 26th of July for Blueſields, which was out of the direct courſe, to join convoy, but was Bond v. Nutt, Cowp. 601.

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detained by an embargo beyond the day limited, viz. till the 6th of Auguſt. The court held, that the ſailing from St. Ann's was the commencement of the voyage; for, when ſhe ſailed from thence, ſhe had no view or object whatſoever, but to make the beſt of her way to England. And this is the great diſtinction, that when a ſhip leaves her port of loading, having a full and complete cargo on board, and having no other view but the ſafeſt mode of ſailing to her port of delivery, her voyage muſt be ſaid to commence from her departure from that port.

Thelluſſon v. Ferguſon, Doug. 346. Park 352.

A few years afterwards a ſimilar deciſion was made, although it was a condition inſerted in one of the ſhip's clearances, that ſhe ſhould paſs by the place (at which ſhe was detained by the governor beyond the day named in the warranty) to take the orders of government. This was not thought ſufficient to induce the court to depart from the deciſion in Bond v. Nutt; eſpecially as the place where the ſhip was detained was in the direct courſe of the voyage.

Eyl v. Harris, at Guildhall, Hil Vac. 1780.

Where an embargo was actually publiſhed before the ſhip ſailed, and the captain, immediately after croſſing the bar, returned to make a proteſt, and ſent his ſhip knowingly into the

embargo, but ſwore that he expected the embargo was to be taken off, and that he ſhould proceed immediately upon his voyage, the jury believed him, and the underwriter was held liable.

A warranty to depart with convoy means, to depart with a naval force under the command of a perſon appointed by the government of the country to which they belong; and not every ſingle man of war which chooſes to take a merchant ſhip under its protection. Park 339.

If a veſſel warranted to depart with convoy do not ſo depart, the policy is defeated, and the underwriter is not reſponſible.

Where a ſhip put herſelf under the direction of a man of war, till ſhe ſhould join the convoy, which had left the uſual place of rendezvous before ſhe arrived there; it was held not to be a departure with convoy, although ſhe joined and was loſt in a ſtorm. Hubbert v. Pigou, B. R. Eaſt. 23 Geo. 3. 1783.

A convoy appointed by the admiral commanding in chief upon a ſtation is a convoy appointed by government.

What ſhall be deemed a departure with convoy has been very clearly pointed out by Mr. Juſtice Buller in this caſe, who ſaid, that in point of law, the general propoſition is, that ſailing inſtructions are neceſſary. But if the captain, Webb v. Thompſon, 1 Boſ. & Pull. 5.

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captain, from any misfortune, from ſtreſs of weather, or other circumſtances, be abſolutely prevented from obtaining his inſtructions, ſtill it is a departure with convoy; but then he muſt take the earlieſt opportunity to obtain them. Generally ſpeaking, unleſs ſailing inſtructions are obtained, the warranty is not complied with: the captain cannot anſwer ſignals; he does not know the place of rendezvous in caſe of a ſtorm: he does not in effect put himſelf under the protection of the convoy, and therefore the underwriters are not beneſited. The other judges concurrred in this opinion.

Anderſon v. Pitcher & Ux. East. 40 Geo. 3. Bos. & Pull. vol. 2. 164.

This was an action brought to recover back 284l. 5s. paid under a policy on the Golden Grove, which had been loſt ſoon after ſailing from Portſmouth.

The ground of the preſent queſtion was, a non-compliance with warranty to depart with convoy. It appeared in evidence, that the Golden Grove arrived at Spithead about 9 o'clock on the 15th of November, 1795—that ſailing inſtructions had been delivered to all ſuch ſhips as applied regularly for them, on the 14th—that the captain, who was on ſhore at Portſmouth previous to her arrival, made inquiry concerning ſailing inſtructions, but

found that they could not be obtained until the ship was actually in sight—that the Admiral commanding the convoy got under weigh by day-light of the 15th, but had not quitted the roadstead until about 4 o'clock in the afternoon; that he left the Trident frigate to bring up such vessels as did not weigh anchor with him —that, about 1 o'clock, the captain of the Golden Grove repaired aboard and got under weigh, at which time the Trident, as well as the admiral's ship, had proceeded so far, that it was clear the Golden Grove could not overtake the latter soon enough for the captain to go on board that night; and it was even doubtful whether he could overtake the former. The next day between 10 and 12 o'clock in the forenoon, being then only a quarter of a mile from the admiral's ship, the captain went on board and obtained sailing instructions. Soon afterwards the Golden Grove was lost, having been from her departure under the protection of the convoy. CHAP. V

On a rule, nisi, for a new trial, when several affidavits were read in support of it, as to the custom in giving sailing instructions, it was contended, that the Golden Grove was not within any of the exceptions to the general rule, which required sailing instructions in order

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der to the fulfilment of a warranty to depart with convoy, and the caſe of Webb v. Thompſon was cited in ſupport of it. The counſel in ſupport of the rule relied much on the uſage of trade, to ſhew that ſailing inſtructions were not neceſſary till the ſhip was actually put to ſea. But the court were of opinion, that this caſe did not come within any of the exceptions to the general rule. In the courſe of the argument, Lord Eldon ſtated, that it being very uſual to refuſe to give ſailing inſtructions till the fleet is out at ſea, it is clear, therefore, that a ſhip is not bound to obtain ſailing inſtructions in the place of rendezvous, at all events; but if they can be obtained by due diligence, ſhe is bound to obtain them; becauſe it then appears, that the convoy appointed by government decides, that under all the circumſtances of the caſe, the place of rendezvous is the place where they ought to be obtained.

Lethulier's Caſe, 2 Salk. 443. Gordon v. Morley, 2 Str. 1265.

Sailing with convoy from the uſual place of rendezvous, as Spithead for the port of London, is a departure with convoy, within the meaning of ſuch a warranty.

2 Salk. 443. 3 Levinz, 320. Jeffreys v. Legendra.

Upon this kind of warranty it is to be obſerved, that although the words commonly uſed are, "to depart with convoy," or, "to ſail "with convoy," yet they extend to ſailing with convoy

convoy throughout the whole voyage, as much as if the words were inserted.

But an unforeseen separation from convy by storm or otherwise, is an accident to which the underwriter is liable, provided the same has not been owing to the negligence and delay of the captain.

And even, where the ship, by tempestuous weather, has been prevented from joining the convoy at all, at least of receiving the orders of the commander of the ship of war, if she does every thing in her power to effect it, this shall be deemed a sailing with convoy. Victoria v. Cleave, 2 Stra. 1250.

But the underwriter is discharged, if the convoy throw out repeated signals to join, and, by the negligence and delay of the captain of the ship insured, the opportunity be lost. Taylor v. Woodmast, sit. at Guildhall, Hil. Vac. 4 Geo. 3.

If the course, upon a particular voyage, has been to have a relay of convoy, protecting the trade from one port to another; or if government appoint a convoy to escort the trade of a place to a given latitude, and no further, and there be no other convoy on that station, a vessel, taking the advantage of such a convoy, sufficiently complies with a warranty to sail with convoy for the voyage. Park 349. Smith v. Bradshaw, London Sittings after East. 1781. De Garay v. Chigett, London Sittings after Mich. 795. 2 H. Black. 554.

This act was passed for the purpose of compelling 38 Geo. 3. c. 76.

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Sect. 1. The firſt ſection provides, that it ſhall not be lawful for any ſhip belonging to any of his Majeſty's ſubjects (except as therein after is excepted) to ſail from any port unleſs under convoy.

Sect. 2. That the maſter of every ſuch ſhip which ſhall ſo ſail with convoy, ſhall uſe his utmoſt endeavours to continue therewith during the voyage, nor wilfully depart therefrom without leave from the commanding officer.

Sect. 3. That if he ſhall depart therefrom without leave, he ſhall forfeit 1000l. and in caſe the whole, or any part of the cargo, conſiſted of naval or military ſtores, the penalty is 1500l. mitigable to 50l. in the diſcretion of the court where the action may happen to be brought.

Sect. 4. In ſuch caſe alſo, or of a ſailing without convoy, every inſurance, or contract for inſurance on ſuch ſhip or goods laden therein, or intereſt ariſing out of the ſame, (which ſhall be the property of the maſter, or of any perſon intereſted in ſuch veſſel or cargo, privy to or inſtrumental in cauſing ſuch veſſel to ſail without convoy, or to ſeparate therefrom,) ſhall be null and void; and that nothing ſhall be recovered thereon

thereon by the assured for loss or damage, or for the premium: and if any party thereto, or broker, shall transact a settlement on such insurance, or allow money on account thereof, every such person shall forfeit 200l. CHAP. V.

Respects the bond to be given to the officers of the customs by vessels clearing outwards. Sect. 5.

Act not to extend to vessels not required to be registered—to ships licensed to sail without convoy by the Lords of the Admiralty, or persons by them duly authorized—to ships proceeding to join convoy when convoy sails from a different port, except as to the bond mentioned in the preceding section—to any ship bound to or from any port in Ireland—to ships bound from one port to another in Great Britain; nor to ships in the service of the East India or Hudson's Bay companies. Sect. 6.

Neither is the act to extend to ships sailing from foreign ports where no convoy is appointed, nor persons authorized to grant licenses to sail without convoy. Sect. 8.

Respect the signals to be obeyed, and penalties in case of refusal or neglect—and the remainder of the statute directs how the duties shall be raised. Sect. 9, 10, & 11.

If the ship and property are neutral at the time when the risk commences, this is a sufficient Eden v. Parkinson, Dougl. 705

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cient compliance with a warranty of neutrality. The inſurer takes upon himſelf the riſk of war and peace: for, if the property be neutral at the time of failing, and a war break out the next day, the inſurer is liable.

Tyſon v. Gurney, 3 T. R. 477.

Park 294.

Deviation is underſtood to mean a voluntary departure, without neceſſity or any reaſonable cauſe, from the regular and uſual courſe of the ſpecific voyage inſured. Wherever a deviation of this kind takes place, the voyage is determined, and the underwriters diſcharged from any reſponſibility.

Dougl. Rep. 288.

If the voyage be changed after the departure of the ſhip, it becomes a different voyage, and not that againſt which the inſurer undertakes to indemnify (which is the true objection to deviation); and the riſk may be ten times greater, which, probably, the inſurer would not have run at all, or, at leaſt, would not without a larger premium. Nor is it at all material, whether the loſs be or be not an actual conſequence of the deviation; for the inſurers are in no caſe anſwerable for a ſubſequent loſs, in whatever place it happens, or to whatever cauſe it may be attributed. Neither does it make any difference, whether the inſured was or was not conſenting to the deviation.

The

The plaintiff was a shipper of goods in a vessel bound from Dartmouth to Liverpool; the ship sailed from Dartmouth and put into Loo, a place she must of necessity pass by; and, although no accident befel her in going into or coming out of Loo, (for she was lost after she got out to sea again) yet Mr. Justice Yates held, that this was a deviation.

Fox v. Black, Exeter Assizes, 1767. Park 295.

The ship, Charming Nancy, was insured from Dunkirk to Leghorn. She came to Dover in her way to procure a Mediterranean pass, and was afterwards lost. Lord Mansfield was of opinion that the calling at Dover was a deviation, and the plaintiff was nonsuited.

Townson v. Guyon, before Lord Mansfield.

If the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation, and discharges the insurer.

In an insurance of goods at and from Whitehaven to St. Michael's, with liberty to touch and stay at any place or places whatsoever, and particularly at Cork, in her passage out. The ship was driven by stress of weather into Dublin, and there she unloaded a great part of the coals, of which her cargo consisted, and then proceeded on her voyage, and was lost.

Stitt v. Wardell, Sit. at Guildhall, after Mich. 1797.

Lord Kenyon C. J. was of opinion, that as the liberty given was only to touch and stay,

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ſtay, but not to trade, the unloading and ſelling the coals, though the ſhip was not further delayed thereby, was a breaking bulk, and avoided the policy: and, upon being aſked by the plaintiff's counſel, his Lordſhip ſaid he ſhould have been of the ſame opinion if this breaking bulk had happened at Cork.

Elliott & others v. Wilſon & Co. 7 Brown, Parl. Caſ. P. 459.

The inſured gave the following inſtructions in writing to Hamilton and Bogle, inſurance brokers in Glaſgow: "Pleaſe to inſure for "our account, by the Kingſton, George Finlay maſter, from Carron to Hull, with liberty to call as uſual, fourteen hogſheads of "tobacco." Theſe inſtructions were entered in the broker's books for the peruſal of the underwriters, as is the practice at Glaſgow; and the inſurers underwrote a policy of inſurance in theſe terms: "beginning the adventure of the ſaid tobacco, at and from the "loading thereof on board the ſaid ſhip "Kingſton, at Carron Wharf, and to continue "and endure until ſaid Kingſton (being allowed a liberty to call at Leith) ſhall arrive "at Hull, and there be ſafely delivered." It being uſual for veſſels, on the coaſting trade, to call at Borrowſtowneſs, Leith, and Morriſon's Haven this veſſel ſtopped at the latter, and received no damage in going into or coming out

out of it. The courts in Scotland held it was no deviation; but their judgment was reverſed in the Houſe of Lords, who were of opinion that a wilful deviation from the due courſe of the inſured voyage, is, in all caſes, a determination of the policy: that, from that moment, the engagement between the inſurers and inſured is at an end: that it is immaterial from what cauſe, or at what place, a ſubſequent loſs ariſes, the inſurers being, in no caſe, anſwerable for it: that the going into Morriſon's Haven was a wilful deviation from the due courſe of a voyage from Carron to Hull: that though it may be true, as contended, that ſhips ſailing through the Firth of Forth have ſometimes been permitted, by the terms of the policy, underwritten at the ſame premium as the preſent, to go into that port, it could not avail in the preſent caſe, ſince the policy in queſtion had given no ſuch permiſſion. CHAP. V.

If ſeveral places are named in the policy, the ſhip may go to thoſe places in the order in which they are named; for to depart from that courſe is a deviation, unleſs there be ſome uſage proved, or ſome ſpecial facts to vary the general rule. By inverting the names contrary to the natural order of the places, it is preſumed the

Beatſon v. Howarth, 6T. R. 531.

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the parties intend to vary the natural courſe of the voyage.

Hog v. Horner, Sitt. at Guil hall, Mich. Term 1797. Park 298.

However ſhort the time of deviation may be, if only for a ſingle night, or even for an hour, the underwriter is equally diſcharged, as if there had been a deviation for weeks or months: for, the condition being once broken, no ſubſequent act can make it good.

Cock v. Townſon, C. P. before Lord Camden, Ch. J.

The ſhip George was bound from Cork to Jamaica under convoy. Being a ſhip of force, ſhe, with two other veſſels, took advantage of the night, to cruiſe, in hopes of meeting with a prize: it was held a deviation.

Jolly v. Walker, at Guildhall, Eaſt. Vac. 1781.

But, by Lord Mansfield, if a merchant ſhip carry letters of marque, ſhe may chaſe an enemy, though ſhe may not cruiſe, without being deemed guilty of a deviation.

Moſs v. Byrom, 6 T. R. 379.

In this caſe, the judges were unanimouſly of opinion, that if the aſſured, without the knowledge of the underwriters, take out a letter of marque, (but without a certificate, agreeable to the 33d Geo. 3. ch. 66. ſec. 15. which is abſolutely neceſſary to its validity) for the purpoſe of inducing the ſeamen to enter, and without any intention of cruiſing, this does not ſo eſſentially vary the riſk as to avoid the policy.

Park 298.

The doctrine, that a voluntary deviation from

from the voyage insured, vitiates the policy, has been held to be applicable to an insurance upon freight, as well as to an insurance upon ship and goods.

Thus in a case upon a policy of assurance on freight of the ship Bethiah, at and from Bourdeaux to Virginia, warranted American ship and property; the declaration alleged, that the ship was an American ship, and the property of American subjects. The plaintiff proved the ship to be an American, and it was to have been contended, on the part of the defendant, that the warranty extended to the goods on board, as well as to the ship: but, upon the evidence, it appeared that the goods, whether American or not, were to be carried in the ship from Bourdeaux to St. Domingo; and that she was only to call at Norfolk, in Virginia, for orders. This rendered it unnecessary to discuss, or decide the question upon the construction of the warrantry, Lord Kenyon being of opinion, that the underwriters, upon this policy, had a right to expect that the goods, upon which the freight was payable, were consigned to Virginia; and that, if the freight was payable for the carriage of them from Bourdeaux to St. Domingo, the underwriters were not liable for the loss, though the

Murdoch v. Potts, Sitt. at Guildh. after Trin. 1795.

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ſhip was to call at Norfolk for orders, the freight payable being, in ſuch caſe, different from the freight inſured. The plaintiff was non-ſuited, and no application was made to ſet aſide the nonſuit.

Elton v. Brogdon, 2 Stra. 1264

But though voluntary deviation is fatal to the validity of the contract of inſurance, yet, wherever deviation is occaſioned by unavoidable neceſſity, or where the crew force the captain to deviate, the underwriters ſtill remain liable.

Motteux & others v. the London Aſſ. Com. 1 Atk. 545.

If a ſhip be decayed, and go into the neareſt port to refit, it is no deviation; becauſe it is for the general intereſt of all concerned that the ſhip ſhould be put in a proper condition.

Guibert v. Reuſhaw, Sittings in London, Hil. Vac. 1781.

Wherever a ſhip, in order to eſcape a ſtorm, goes out of the direct courſe; or when, in the due courſe of the voyage, ſhe is driven out of it by ſtreſs of weather, this is no deviation: becauſe it was occaſioned by the act of God, which, by a maxim of law, is ſaid to work an injury to no man.

Harrington v. Halkeld, Sittings in London, Mich. Vac. 1778.

It has alſo been held, that if a ſtorm drive a ſhip out of the courſe of her voyage, and ſhe do the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven.

Delaney v. Stoddart,

If a ſhip be driven out of her port of loading

ing by ſtreſs of weather into another, and there do the beſt ſhe can to get to her port of deſtination, it ſhall not be deemed a deviation, though ſhe do not return to the port from whence ſhe was driven. Neither is it a deviation if ſhe complete her lading at the port into which ſhe is driven.

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1 T.R. 22.

The William galley was inſured in a voyage from Bremen to the port of London, warranted to depart with convoy. She ſet ſail from Bremen, under the convoy of a Dutch man of war, to the Elbe, where they were joined by two other Dutch men of war, and ſeveral Dutch and Engliſh merchant ſhips, whence they ſailed to the Texel, where they found a ſquadron of Engliſh men of war and an admiral. After a ſtay of nine weeks, they ſet out from the Texel, and the galley was ſeparated in a ſtorm, and taken by a French privateer, taken again by a Dutch privateer, and paid 80l. ſalvage. It was ruled by Lord Chief Juſtice Holt, that the voyage ought to be according to uſage, and that their going to the Elbe, though, in fact, out of the way, was no deviation; for, till after the year 1703, there was no convoy for ſhips directly from Bremen to London. The plaintiff had a verdict.

Bond v. Gonſales, 2 Salk. 445.

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Gordon v. Morley, Campbell, & Bordieu, 2 Stra. 1265.

On an insurance, warranted to depart with convoy from London to Gibraltar, it appeared there was a convoy appointed for that trade at Spithead; and the ship Ranger, having tried for convoy in the Downs, was proceeding to Spithead, but taken in her way thither. The insurers insisted, that this being in the time of a French war, the ship should not have ventured through the Channel, but have waited in the Downs for an occasional convoy; and many merchants and office-keepers were examined to that purpose. But Lord Chief Justice Lee held, that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words, warranted to depart with convoy. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the Downs. The juries were composed of merchants; and, in both cases, they found for the plaintiffs upon the strength of this direction.

Cowp. Rep. 601 ante.

In the case of Bond v. Nutt, Lord Mansfield and the whole court held, that if a ship go to the usual place of rendezvous for the sake of joining convoy, there ready, though such

such place be out of the direct course of the voyage, it is no deviation.

Enderby & another v. Fletcher, Sittings in London, Trin. Vac. 178[illegible].

In a more modern case, the only question was—whether there was a deviation or not? Lord Mansfield there directed the jury to find for the plaintiffs, if they believed that the captain fairly, and *bona fide*, acted according to the best of his judgment: that he had no other view or motive but to come the safest way home, and to meet with convoy; for that it was no deviation to go out of the way to avoid danger.

Park 308--9

We sometimes meet with cases in our law books, which say, that a deviation may be justified by the usage of trade. That is not quite correct; for if, by the usage of any particular trade, it be customary to stop at certain places, lying out of the direct course from A to B, it is not a deviation, because it is a part of the voyage. The insurer is not deceived; for he is bound to take notice of the usages of trade, which are notorious to all the world; and whether the usage has declared it lawful, in a specific voyage, to go to any place, though out of the immediate track, it becomes as much a part of the contract of insurance between the parties, as if it had been particularly mentioned. But, in

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order to juſtify the captain of a ſhip in quitting the ſtraight and direct line from the port of loading to that of delivery, there muſt be a preciſe, clear, and eſtabliſhed uſage upon the ſubject, not depending, merely, upon one or two looſe and vague inſtances.

Saliſbury v. Townſon, Park 309.

When a ſhip was inſured from Liverpool to Jamaica, and had put into the Iſle of Man, it appeared that there were ſome inſtances of the Liverpool ſhips putting in there; but it was not the ſettled, common, eſtabliſhed, and direct uſage of the voyage and trade. It was, therefore, held to be deviation; and the underwriters were diſcharged from any ſubſequent loſs.

Cowp. 601.

In order to determine whether a deviation from the direct courſe of the voyage, is ſuch a deviation as in law vacates the policy, it will be proper to attend to the motives, end and conſequences of the act, as the true criterion of judgment. For, wherever a ſhip does that which is for the general benefit of all concerned, the act is as much within the intention and ſpirit of the policy, and; conſequently, as much protected by it, as if expreſſed in terms.

Lavabre v. Walter,

If any of the circumſtances above ſtated do really, and *bona fide*, occur, ſo as to render a devi-

a deviation abſolutely neceſſary, the ſhip muſt purſue ſuch *voyage of neceſſity* in the direct courſe, and in the ſhorteſt time poſſible, otherwiſe, the underwriters will be diſcharged. Becauſe, a voyage ſuperadded by neceſſity ought to be ſubject to the ſame qualifications, and intitled to the ſame ſort of latitude, as the original voyage, it having become, by operation of law, a part, as it were, of that original voyage. CHAP. V. Dougl. 284. Park 310.

If a ſhip be inſured on a trading voyage, it is incumbent on the parties aſſured to carry on that trade with uſual and reaſonable expedition; otherwiſe, their conduct will amount to a deviation, and diſcharge the policy. Hartley v. Buggin, B. R. Mich. 22 Geo. 2.

But, though an actual deviation is thus fatal to the contract of inſurance, yet, where a deviation is merely intended, but never carried into effect, it is conſidered as no deviation, and the inſurer continues liable. This has been frequently ſo decided. Thus, in an inſurance from Carolina to Liſbon, and at and from thence to Briſtol, it appeared that the captain had taken in ſalt, which he was to deliver at Falmouth before he went to Briſtol; but the ſhip was taken in the direct paſſage to both, and before ſhe came to the point where ſhe would have turned off to Fal- Forſter v. Wilmer, 2 Stra. 1249

CHAP. V. mouth. It was held, that the inſurer was liable; for it was but an intention to deviate, and that was held not ſufficient to diſcharge the underwriter.

2 Stra. 1249. So, alſo, in the caſe of Carter v. the Royal Exchange Aſſurance Company, where the inſurance was from Honduras to London, and a conſignment to Amſterdam. A loſs happened before the ſhip came to the dividing point between the two voyages, for which the inſurers were held liable.

Dougl. 361. This doctrine has been ſince frequently recognized in ſubſequent deciſions; and particularly by Lord Mansfield in the caſe of Thelluſſon v. Ferguſſon. The inſurance was from Guadaloupe to Havre, and by the depoſitions it appeared, that the ſhip ſailed for Havre, and was always intended for Havre; but was directed to keep in the courſe of Breſt for ſafety. One of the grounds of defence was, that the ſhip never ſailed from Guadaloupe to Havre, but on a voyage from Guadaloupe to Breſt. Lord Mansfield, in anſwer, ſaid, "the voyage to Breſt was, at "moſt, but an intended deviation, not car-"ried into effect."

If, however, all the ſhip's papers and documents be made out for a different place, the

the insurer is discharged from all responsibility, even though the loss should happen before the ship came to the dividing point of the two voyages. CHAP. V.

Thus, on a motion for a new trial, the material facts were as follows:—The ship was cleared from Maryland to Falmouth, and a bond given that all the *enumerated* goods should be landed in Britain, and all the other goods in the British dominions. An affidavit of the owner stated, that the vessel was bound for Falmouth. The bills of lading were "to Falmouth and a market;" and there was no evidence whatever that she was destined for Cadiz (for which place she had been insured). The place where she was taken, was in the course from Maryland, both to Cadiz and Falmouth, before the dividing point. At the trial Lord Mansfield told the jury, that if they thought the voyage intended was to Cadiz, they must find for the plaintiff. If, on the contrary, they should think there was no design of going to Cadiz, they must find for the defendant. The jury found, accordingly, for the defendant. The counsel for the plaintiff, on the motion for a new trial, cited the two last quoted cases. Wooldridge v. Boydell, Dougl. 16.

Lord Mansfield.—"The policy, on the

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" face of it, is from Maryland to Cadiz, and, " therefore, purports to be a direct voyage to " Cadiz. All contracts of insurance must be " founded on truth, and the policies framed " accordingly. When the insured intends a " deviation from the direct voyage, it is al- " ways provided for, and the indemnification " adapted to it. There never was a man so " foolish as to intend a deviation from the " voyage described when the insurance is " made, because, that would be paying with- " out an indemnification. Deviations from the " voyage insured, arise from after-thoughts, " after-interest, after-temptation; and the " party who actually deviates from the " voyage described, means to give up his " policy. But a deviation merely intend- " ed, but never carried into effect, is as no " deviation. In all the cases of that sort, the " *terminus a quo* and *ad quem*, were certain " and the same. Here, was the voyage ever " intended for Cadiz? But some of the " papers say to Falmouth and a market: some " to Falmouth only. None mention Cadiz, " nor was there any person in the ship who " ever heard of any intention to go to that " port. A market is not synonymous to Ca- " diz; that expression might have meant " Naples,

"Naples, Leghorn, or England. No man, "upon the instructions, would have thought "of getting the policy filled up to Cadiz. In "short, that was never the voyage intended, "and, consequently, is not what the under-"writers meant to insure." CHAP. V

The other Judges concurring, the rule for a new trial was discharged.

The same doctrine was holden in a later case, viz. that if a ship be insured from a day certain, from A to B, and, before the day, sail on a different voyage from that insured, the assured cannot recover, even though the ship afterwards fall into the course of the voyage insured, and be lost after the day on which the policy was to have attached. Way v. Modigliani 2 T. R. 30

In an assurance, *at and from Grenada to Liverpool*, the ship sailed from Grenada, bound for Liverpool, but with a design, formed before the commencement of the voyage, as appeared by the clearances, and was admitted on all sides, to touch at Cork, in her way to Liverpool. She was totally lost before her arrival at the dividing point. The Court of Common Pleas delivered their opinion, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voy- Kewley v. Ryan, 2 H. Black Rep. p. 343

CHAP. V.

age; and a deſign to deviate, not effected, would not vitiate the policy. That in Wooldridge v. Boydell, which had been quoted, it appeared there was no intention that the ſhip ſhould go to Cadiz at all, which was mentioned in the policy as her port of delivery; and in Way v. Modigliani, there was an actual deviation. Theſe caſes, therefore, were wholly different from the preſent; for here the ſhip was really bound for Liverpool, though there were alſo clearances for Cork.

It follows, as an immediate conſequence, that whatever damage is ſuſtained before actual deviation will fall upon the underwriters.

Green v. Young, 2 Ld. Raymond, 840. 2 Salk. 444.

Thus, it was held by Lord Chief Juſtice Holt, who ſaid, that if a policy of inſurance be made to begin from the departure of the ſhip from England, &c. and after the departure a damage happen, &c. and then the ſhip deviate; though the policy is diſcharged from the time of deviation, yet, for the damages ſuſtained before, the inſurer ſhall make ſatisfaction.

Dougl. 758.

Subject to the aforeſaid rules, deviation, or not, is a queſtion of fact, to be decided according to the circumſtances of the caſe.

Park 290.

As it is eſſentially requiſite, to render a policy of inſurance effectual, that the name

of

of the ſhip on which the riſk is to be run ſhall be inſerted, it follows, as an implied condition, that the inſured ſhould neither ſubſtitute another ſhip for that mentioned in the policy before the voyage commences (for in that caſe there would be no contract at all), nor, during the courſe of the voyage, remove the property inſured to another ſhip, without the conſent of the underwriter, or without being impelled by a caſe of unavoidable neceſſity. CHAP. V.

The plaintiff had inſured, intereſt or no intereſt, on any ſhip he ſhould come in from Virginia to London, beginning the adventure on his embarking on board ſuch ſhip; the money to be paid, though his perſon ſhould eſcape, or the ſhip be retaken. He embarked in the Speedwell; but ſhe ſpringing a leak at ſea, he went on board the Friendſhip, and arrived ſafe at London: but the Speedwell was taken after he left her. The court held the underwriter to be liable; for the inſurance was on the ſhip the plaintiff ſet out in: and had that got ſafe home, and the other been loſt, the plaintiff could not have recovered upon the ground of having removed his perſon into that ſhip in the middle of the voyage. Dick v. Barrel, 2 Stra. 1248.

But an inſurance, generally, "on any ſhip "or ſhips" expected from a particular place, Kewley v. Ryan,

is

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is valid; and the insured has a right to cover any ship he may think proper, that falls within the terms of it.

2H.Blackst. 343.

Plantamoor v. Staples, 1T.R.611. note (*a*)

Nor do the owners of goods preclude themselves, by shifting the goods from one ship to another, from recovering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned.

1 Burr.351.

Lord Mansfield, when delivering the opinion of the court, in the case of Pelley v. the Royal Exchange Assurance Company, alluded to the general doctrine relative to changing the bottom of the ship. "One objection," said his Lordship, "was formed by comparing "this case to that of changing the ship or "bottom on board of which goods are "insured; *which the injured have no right to* "*do.* For there the identical ship is essential; "that is the thing insured."

Eden v. Parkinson, Dougl. 708.

With regard to the sea-worthiness of the vessel, without which there can be no binding contract between the parties to an insurance, it was said by Lord Mansfield that, "by an "implied warranty, every ship insured must be "tight, staunch, and strong; but it is sufficient "cient if she be so at the time of her sailing."

Chap. 2.

In the second chapter this subject has been already

already treated, and to that the reader is now referred. The policy, in every caſe where the ſhip inſured has not been ſea-worthy, becomes abſolutely void. It remains now to inquire in which of the caſes cited in this chapter the premium is to be retain ed, where to be returned. CHAP. V.

The principle upon which the whole of this doctrine depends, is ſimple and plain not admitting of doubt or ambiguity. The riſk or peril is the conſideration for which the premium is to be paid: if the riſk be not run, the conſideration for the premium fails; and equity implies a condition, that the inſurer ſhall not receive the price of running a riſk, if, in fact, he runs none. And to whatever cauſe it be owing that the riſk is not run, as the money was put into the hands of the inſurer, merely for the riſk of indemnifying the inſured, the purpoſe having failed, he cannot have a right to retain the ſum ſo depoſited for a ſpecial cauſe. Cowp. 668. 1 Show. 156.

It frequently happens that the parties themſelves inſert clauſes in the policy, ſtating, that upon a certain event, there ſhall be a return of premium. Dougl. 268.

Theſe clauſes bind the parties, and their conſtruction reſts with the court.

A clauſe

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Simond v. Boydell, Dougl. 268.

A clauſe was inſerted, that 8l. per cent. of the premium ſhould be returned if the ſhip ſailed from any of the Weſt India iſlands with convoy for the voyage, and arrived. The court held, that the arrival of the ſhip, whether with or without convoy, intitled the party to a return of premium. And Mr. Juſtice Buller ſaid, the queſtion was for the deciſion of the court, not of a jury, ſince it aroſe on the conſtruction of a written inſtrument.

Aguilar and others v. Rodgers, 7 T.R. 421.

In a later caſe, there was a clauſe in a policy on freight "*to return* 10*l. per cent. if the* "*ſhip ſailed with convoy and arrived.*" The ſhip ſailed with convoy, was captured and recaptured during the voyage, arrived at her port of deſtination, but paid ſalvage to the recaptors. It was contended, therefore, that the aſſured were not intitled to a return of premium. Lord Kenyon held, that in order to ſatisfy the meaning of the memorandum, it ſhould be *an arrival at the deſtined port in the courſe of the voyage.* "It is now too "late," he added, "to controvert the autho- "rity of Hamilton v. Mendes, even if we "were diſpoſed to do ſo, which I am not, "where it was holden, that though the aſ- "ſured may abandon on hearing of a capture, "yet, if they do not abandon, and the ſhip be

"after-

" afterwards re-captured, it must be con- CHAP.
" sidered as if she had never been out of the
" possession of the owners. It is eighteen
" years since the case of Simond v. Boydell
" was decided; that case must be well known
" in the commercial world; and if the parties
" in this case had intended making an agree-
" ment different from that which the words
" used in this memorandum import, they
" would have added after *arrive*, 'safely
" from the enemy,' or some words to that
" effect. But the words here used are not
" equivocal; and we ought not to depart from
" them: it would be attended with great
" mischief and inconvenience, if, in construc-
" ing contracts of this kind, we were not to
" decide according to the words used by the
" contracting parties. Suppose this question
" had arisen on a contract under seal, and
" an action of covenant had been brought,
" assigning as a breach, the non-arrival of the
" ship at the port of London, the answer that,
" in fact, the ship did arrive there in the
" course of her voyage, would have been
" decisive. And if so, this memorandum
" must receive the same construction in this
" action. On the grammatical construction
" of the words, which is the safest rule to go
" by,

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"by, I am of opinion, that the verdict ob-"tained by the plaintiff ought not to be ſet "aſide."

Dougl. 471. When a policy is void, being made without intereſt, contrary to the 19 Geo. 2. if the ſhip has arrived ſafe, the court will not allow the inſured to recover back the premium.

Dougl. 468. When a policy is void, as a wager policy, and the ſhip has arrived ſafe, the court will not allow the inſured to recover back the premium: *In pari delicto potior eſt conditio poſſidentis.* It might, perhaps, be otherwiſe, where the ſhip has not arrived.

Lowry v. Bourdieu.

Andree v. Fletcher, 3T. R. 266. On the authority of the above caſe it has been very lately held, that an action for money had and received, will not lie, to recover back the premium of a re-aſſurance (void by the ſtatute 19 Geo. 2. chap. 37.) after capture.

Where the riſk has once commenced, there ſhall be no apportionment or return of premium afterwards. But, where the contract becomes diviſible from the nature of the voyage, a part of the premium ſhall be retained for the riſk run, and part ſhall be returned for that which never commenced: that is, if there are two diſtinct points of time, or, in effect, two voyages, either in the contemplation of the

3Bur. 1240.

the parties or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, although both are contained in one policy.

Thus, in an insurance at and from London to Halifax, warranted to depart with convoy from Portsmouth; before the ship arrived at Portsmouth the convoy was gone: the premium for the voyage from Portsmouth to Halifax was returned. Stevenson v. Snow, 3 Burr. 1237.

The ship Isabella was insured at and from London to any port or place, where or whatsoever, for 12 months, at 9l. per cent. warranted free from captures and seizures by the Americans, and the consequences thereof. The ship sailed from the port of London, and was taken by an American privateer about two months afterwards. Here, there shall be no return of premium, because the contract was entire: the premium was a gross sum stipulated, and paid for twelve months. Tyrie v. Fletcher, Cowp. 666.

So also, where a ship was insured for twelve months, and was lost at the end of two, though the whole premium of 18l. was acknowledged to be received at the rate of 15s. per month; yet that was held to be only a mode of computing the gross sum. Lorani v. Tomlinson, Dougl. 564.

A ship

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Bermon v. Woodbridge Dougl. 781.

A ſhip was inſured "at and from Honfleur "to the coaſt of Angola, during her ſtay and "trade there, at and from thence to her port "or ports of diſcharge in St. Domingo, and at "and from St. Domingo back to Honfleur." The policy was at an end, by her deviation, before ſhe arrived at St. Domingo; conſequently, for the latter part of the voyage inſured, the inſurer ran no riſk. It was attempted to divide the voyage into three diſtinct parts, or voyages: but the court decided, that though there be ſeveral diſtinct ports, at which the ſhip is to ſtop, yet the voyage is one, and no part of the premium ſhall be recoverable.

Do. 758.

In caſes of deviation, the premium is not to be returned, becauſe, the riſk being commenced, the underwriter is intitled to retain it.

Audley v. Duff, Hil. Term, 40 Geo. 3. Boſ. & Pull. C. P. vol. 2. 111.

This action was brought for a return of premium upon a policy of inſurance, on the ſhip Ceres, "at and from Oporto to Lynn, to de-"liver wines, and to proceed and ſail to, and "touch and ſtay at, any ports or places what-"ſoever, on the coaſt of Portugal, to join con-"voy, particularly at Liſbon." There was a clauſe in the policy, on which the preſent queſtion aroſe, "at the premium of twelve "guineas

" guineas per cent. to return 6l. if the Ceres " ſail with convoy from the coaſt of Portu- " gal, and arrive*." The Ceres ſailed from Oporto with a ſloop and cutter appointed by Lord St. Vincent, having the command on the Liſbon ſtation, to protect the trade of that place to Liſbon, from whence ſhe was to proceed with the Liſbon trade, under a larger convoy, for England. In the way from Oporto to Liſbon, the fleet was diſperſed by a ſtorm, and the Ceres, judging for the beſt, ran for England, and arrived. A verdict was found for the plaintiff at the trial, with liberty to the defendant to move for a non-ſuit. It was contended, in ſupport of the rule, that the underwriters appeared to have two riſks in contemplation; 1ſt, while the ſhip was on the coaſt of Portugal, touching and ſtaying at the ports there, until ſhe had taken her final departure from thence: 2d, from ſuch final departure, till her arrival in England. But the court held, that it being unknown from what

* The caſe of Everard v. Hollingſworth was preciſely the ſame, except in the wording of the clauſe, " depart " with convoy from Portugal," inſtead of " ſail with " convoy from the coaſt of Portugal," which were admitted to be the ſame in effect. This was argued, together with Audley v. Duff.

port

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port on the coaſt of Portugal the convoy would ſail, the clauſe, for the return of premium, was to be adapted to the circumſtances of the caſe; and that the fair interpretation of the agreement was, that the aſſured ſhould have the benefit of the policy, though ſhe ſailed from Oporto without convoy; but that if the Ceres ſailed from Oporto, which is on the coaſt of Portugal, with convoy, then there ſhould be a return of premium.

Meyer v. Gregſon, B. R. Eaſt. 24 Geo. 3.

It has been alſo held, that when a ſhip was inſured "at and from Jamaica to Liverpool, "warranted to ſail on or before the 1ſt of Au- "guſt, premium 20 guineas per cent. to re- "turn 8l. per cent. if ſhe ſailed with convoy," and ſhe did not ſail till September; that there ſhould be no return upon the warranty of the time of ſailing; for the court cannot make a diſtinction between the riſk at, and the riſk from; though it will be otherwiſe, if the jury find an expreſs uſage upon the ſubject of return of premium. It ſeems, that there never has been an apportionment, unleſs there be ſomething like an uſage found to direct the judgment of the court.

Long v. Allen, B. R. Eaſt. T. 25 Geo. 3.

Park 216.

The courts of juſtice in England have not, till lately, adopted any general rule with reſpect to the return of premium in caſes of fraud.

fraud. The court of Chancery has decreed the premium to be returned, in two or three inſtances, where the underwriters have been relieved from the payment of the ſums inſured, on account of fraud.

Whitting-ham v. Thornbo-rough, Pr. Ch. 20. 2 Vern. 206. S. C.

In the year 1690, the defendant and others had come to the inſurance office, and bought a policy for inſuring the life of one Horwell, (on which they had no concern or intereſt depending,) for a year; and the policy ran, whether intereſted or not, a ta premium of 5l. per cent. They took this way of drawing in ſubſcribers, and agreed with one Marwood, a known merchant upon 'Change, and a leading man in ſuch caſes, to ſubſcribe firſt; but, in caſe Horwell died within the year, Marwood was to loſe nothing; on the contrary, he was to ſhare what ſhould be gained from the other ſubſcribers. Upon the credit of Marwood's ſubſcription, ſeveral others (who had inquired of Marwood about Horwell, who was his neighbour) ſubſcribed likewiſe. Horwell lived about four months, and this bill was brought to be relieved againſt the policy. Theſe matters being all confeſſed by the anſwer, the court decreed the policy to be delivered up, and the premium to be repaid.

So

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Da Coſta v. Scandrett, 2 P. Wms. 170. Wilſon v. Duckett, 3 Burr. 1361.

So alſo, in this caſe, Lord Macclesfield, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the inſured.

This trial was had under a decree of the court of Chancery, where the now defendant, the inſurer, being there complainant, had offered to pay back the premium, which was 10l. No money was paid into court. The jury found a verdict for the plaintiff, for the 10l. premium, although they were of opinion againſt the policy, as being fraudulent. The firſt underwriter was only a decoy-duck in fact, to induce other perſons to underwrite the policy: and it had been previouſly agreed, between the inſured and him, that he ſhould not be bound by ſigning the policy. With Lord Mansfield's concurrence, and the counſel on both ſides, it was agreed to bring this queſtion before the court; whether, upon a policy of inſurance being found fraudulent, the premium ſhould be returned. When his Lordſhip aſked, if there was any common law determination to the ſame effect with the caſes in chancery? but, as it did not appear that there was, it was plain, he ſaid, what muſt be done in this caſe; for he looked upon the offer

offer made by the complainant's bill, in equity, to be the same thing as if the money had actually been brought into court, in the present case.

Yet if the fraud is notorious, palpable, and gross, in its nature, the court may order, and has ordered, the underwriter to retain the premium. Tyler v. Horne, Sitt. at Guildhal after Hilary Term, 1785.

In this case, the whole court of King's Bench were of opinion, that in all cases of actual fraud on the part of the assured, or his agent, the underwriter might retain the premium. Chapman & others v. Fraser, B. R. Trin. T. 33 Geo. 3.

It has also been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies against him, at the suit of the insured, to recover the premium. 3 Bur. 1909

CHAPTER THE SIXTH.

OF LOSSES—I. TOTAL—WHEREIN THE INSURERS LIABLE TO MAKE GOOD THE WHOLE DAMAGE SUSTAINED; AND HEREIN ALSO OF ABANDONMENT AND SALVAGE. 2. PARTIAL—HOW DIFFERENT FROM THE OTHER; AND THE CONSEQUENCES ARISING THEREFROM—GENERAL OR GROSS AVERAGE—ADJUSTMENT, AND THE MODE OF COMPUTING THE AMOUNT OF THE LOSS OR DAMAGE, ETC.

CHAP. VI. WHEREVER a loſs happens, by reaſon of any of the perils inſured againſt, in ſuch caſe, the inſurer will be liable to make good the whole damage to the inſured. Of this there can be no doubt; but it may not be improper to ſtate ſome of the deciſions in our courts of juſtice, reſpecting the conſtruction of the policy in this particular.

And

And first, as to perils of the sea, it is to be observed, that every accident happening by the violence of the wind or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, may be considered as a peril of the sea. 1 Show. 323.

But a ship, driven by the wind on an enemy's coast, and there captured, shall not be said to be lost by perils of the sea, but by capture. Green v. Elmslie, Peake 212.

An action having been brought, to recover the value of certain slaves insured by the policy. The declaration stated the loss to have happened by perils of the sea, when the facts were, that the captain missed the island for which he was bound, and the water running short, some of the slaves were thrown overboard, to preserve the rest. It was held, that the mistake of the captain could not be called a peril of the sea. Gregson v. Gilbert, B. R. East. 23 Geo. 3. Park 6a.

So, in a more modern case, the death of some slaves, by failure of sufficient and suitable provisions, though occasioned by extraordinary delay in the voyage, from bad and stormy weather, was holden not to be a loss within the policy, *by perils of the sea.* Tatham v. Hodgson, 6 T.R. 656.

It was attempted, under a count for a loss by perils of the sea, to recover a total loss of Roll v. Parr, Guildhall

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Sitt. after Hil. 1796. Park 63.

the ſhip, which appeared to have been deſtroyed by a ſpecies of worms, which infeſt the rivers of Africa. An intelligent merchant ſwore, that he had known many inſtances of this ſort of loſs, but that the underwriters invariably refuſed to pay. Lord Kenyon, upon this evidence, and the unanimous declaration of the jury, decided that it was not a loſs by perils of the ſea.

If a ſhip has been miſſing, and no intelligence received of her within a reaſonable time after her departure, it ſhall be preſumed that ſhe has foundered at ſea.

Green v. Brown, 2 Stra. 1199.

This was held in an action on a policy upon the Charming Peggy, from North Carolina to London, and the loſs was ſtated to be by ſinking at ſea: the evidence to ſupport this averment, was, that after ſailing from port, ſhe had never been heard of.

Newby v. Read Sit. after Mich. 3 Geo. 3.

The ſame doctrine was held, where a ſhip had been captured, and ranſomed at ſea, but was never heard of afterwards. Lord Mansfield told the jury, that this evidence was a ſufficient ground to preſume that ſhe periſhed at ſea.

Park 63.

There is no time fixed by the laws of England, within which payment of a loſs may be demanded from the underwriters, in caſe the ſhip

ſhip is not heard of. A practice, however, has prevailed among merchants, that a ſhip ſhall be deemed loſt, if not heard of within ſix months after her departure for any part of Europe, or within twelve months, if for a place at a greater diſtance.

Second, as to loſſes by capture, the rule is, that as between the inſurer and inſured, the ſhip is to be conſidered as loſt by the capture, though ſhe be never condemned at all, nor carried into any port or fleet of the enemy; and the inſurer muſt pay the value. If, after condemnation, the owner recover or retake her, the inſurer can be in no other condition than if ſhe had been retaken, or recovered, before condemnation. The inſurer runs the riſk of the inſured, and undertakes to indemnify; he muſt, therefore, bear the loſs actually ſuſtained, and can be liable to no more. So that, if, after condemnation, the owner recover the ſhip, in her complete condition, but has paid ſalvage, or been at any expence in getting her back, the inſurer muſt pay the loſs ſo actually ſuſtained. No capture by the enemy, can be ſo total a loſs as to leave no poſſibility of recovery. If the owner himſelf ſhould retake at any time, he will be intitled; and, by a late act of parliament,

2 Burr 694. 1ſt point in Goſs v. Withers.

2 Burr. 696.

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29 Geo. 2. ch. 34. ſ. 24. 34 Geo. 3. ch. 66. ſ. 42.

if an Engliſh ſhip retake the veſſel captured, either before or after condemnation, the owner is intitled to reſtitution, upon ſtated ſalvage. This chance does not, however, ſuſpend the demand for a total loſs upon the inſurer; but juſtice is done, by putting him in the place of the inſured, in caſe of a re-capture.

2 Bur. 683. Berens v. Rucker, 1 Black. Rep. 313.

It has likewiſe been held, that where a capture has been made, whether it be legal or not, the inſurers are liable for the charges of a compromiſe made, bona fide, to prevent the ſhip from being condemned as prize.

The laſt caſe was quoted, without contradiction, in Tyſon and another v. Gurney, 3 T. R. 477. and the point, in ſupport of which it was adduced, was held accordingly.

22 Geo. 3. ch. 25. & 33 Geo. 3. ch. 66. ſ. 37, 38 & 39.

It is declared to be illegal, for the captains or owners of any Britiſh ſhips, who are captured, to ranſom themſelves from the enemy; and the contract to ranſom is not only declared abſolutely void, but the parties entering into them are puniſhable by fine. Upon this principle, no ſum paid on ſuch account can be recovered from the underwriters.

Havelock v. Rockwood, 8 T. R. 268.

The ſhip Themis was inſured for twelve months, during which period ſhe was captured, and carried into Bergen, in Norway; and there condemned by the French conſul.

She

She was afterwards put up to sale, by the public officer of the court of Denmark, and re-purchased by the agent for the plaintiff, who insisted, that (if not intitled to recover as for a total loss) he was, at all events, intitled to a verdict for the re-purchase money. But the court, after two arguments, were unanimously of opinion, that as the sentence of the French consul, in a neutral country, was contrary to the law of nations, and void, the property never was divested out of the original owner; and that therefore the money, paid for the re-purchase, was in the nature of a ransom.

By the marine law of England, as practised in the court of admiralty, it was formerly held, that the property was not changed, so as to bar the original owner, in favour of a vendee or re-captor, till there had been a sentence of condemnation. But now, by statute, this right of the original owner, in cases of re-capture, is preserved to him for ever. The words of this clause of the statute, are, "that if any "ship, or vessel, or boat, taken as prize, or any "goods therein, shall appear, and be proved, "in any court of admiralty having a right to "take cognizance thereof, to have belonged "to any of his Majesty's subjects of Great "Britain or Ireland, or any of the dominions

Park 71.

33 Geo. 3. ch. 66.

s. 42.

CHAP. VI. " and territories remaining and continuing
" under his Majeſty's protection and obedi-
" ence, which were before taken or ſurpriſed
" by any of his Majeſty's enemies, and, at any
" time afterwards, again ſurpriſed and retaken
" by any of his Majeſty's ſhips of war, or any
" privateer, or other ſhip, veſſel, or boat, un-
" der his Majeſty's protection and obedience,
" that then ſuch ſhips, veſſels, boats, and
" goods, and every ſuch part and parts thereof,
" as aforeſaid, formerly belonging to ſuch his
" Majeſty's ſubjects, ſhall, in all caſes, (ſave
" in ſuch as are hereafter excepted,) be ad-
" judged to be reſtored, and ſhall be, by de-
" cree of the ſaid court of admiralty, accord-
" ingly reſtored to ſuch former owner, or
" owners, or proprietors, he or they paying
" for, and in lieu of ſalvage, (if retaken by any
" of his Majeſty's ſhips,) one eighth part of the
" true value of the ſhips, veſſels, boats, and
" goods reſpectively, ſo to be reſtored, which
" ſaid ſalvage of one eighth ſhall be anſwered
" and paid to the flag officers, captains, offi-
" cers, ſeamen, marines, and ſoldiers, in his
" Majeſty's ſaid ſhip or ſhips of war, to be di-
" vided in ſuch manner as before in this act is
" directed, touching the ſhare of prizes be-
" longing to the flag-officers, captains, officers,
" ſeamen,

" ſeamen, marines, and ſoldiers, where prizes CHAP. VI.
" are taken by any of his Majeſty's ſhips of
" war; and if re-taken by any privateer, or
" other ſhip, veſſel, or boat, one ſixth part of
" the true value of the ſaid ſhips, veſſels,
" boats, and goods; all which payments to be
" made to the owner or owners, officers and
" ſeamen of ſuch privateer, or other ſhip,
" veſſel, or boat, ſhall be without any de-
" ductions, and ſhall be divided in ſuch man-
" ner and proportions as ſhall have been
" agreed on by them as aforeſaid; and in caſe
" ſuch ſhip, veſſel, or goods, ſhall have been
" re-taken by the joint operation or means of
" one or more of his Majeſty's ſhips, and one
" or more private ſhip or ſhips, then the judge
" of the high court of admiralty, or other
" court having cognizance thereof, ſhall order
" and adjudge ſuch ſalvage to be paid to the
" re-captors, by the owner or owners of ſuch
" re-taken ſhip, veſſel, or goods, as he ſhall,
" under the circumſtances of the caſe, deem
" fit and reaſonable; which ſalvage, ſo to be
" adjudged, ſhall be accordingly paid by the
" owners of ſuch re-taken ſhip, veſſel, or
" goods, to the agents of the re-captors, in
" ſuch proportions as the ſaid court ſhall ad-
" judge; but if ſuch ſhip or veſſel, ſo re-taken,

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" ſhall appear to have been, after the taking " by his Majeſty's enemies, by them ſet forth " as a ſhip or veſſel of war, the ſaid ſhip or " veſſel ſhall not be reſtored to the former " owners or proprietors, but ſhall, in all caſes, " whether re-taken by any of his Majeſty's " ſhips, or by any privateer, be adjudged law- " ful prize for the benefit of the captors."

Before the ſtatute of 19th Geo. 2. chap. 37. ſeveral caſes were determined upon the queſtion of re-capture, in our courts; but the ſame queſtions can never again ariſe between an inſurer and the inſured.

Park 77. At this day, in caſes of capture, the underwriter is immediately reſponſible to the inſured. But if the ſhip be recovered before a demand for indemnity, the inſurer is only liable for the amount of the loſs actually ſuſtained at the time of the demand: or, if the ſhip be reſtored at any time ſubſequent to the payment by the underwriter, he ſhall then ſtand in the place of the inſured, and receive all the benefit and advantages reſulting from ſuch reſtitution.

Third, as to loſſes by detention. The underwriter, by the expreſs terms of his contract, is anſwerable for a loſs or damage ariſing to the inſured " by the arreſts, reſtraints, and " detain-

" detainments of all kings, princes, and peo-
" ple, of what nation, condition, or quality
" whatsoever."

Nisbett and another v. Lushington, 4 T.R. 783.

In a late case, the plaintiffs claimed for a loss of corn, occasioned by the *unlawful arrest, restraint, and detention of people to the plaintiffs unknown.* It appeared in evidence, that the ship was forced by stress of weather into Elly harbour in Ireland. There happened to be a great scarcity of corn there at that time, and the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove on a reef of rocks, where she was stranded; nor did they leave her till they had compelled the captain to sell all the corn, (except about ten tons,) at a rate not exceeding three-fourths of the invoice price.

It was contended at the bar, that the word *people*, meant individuals of a nation; but by Lord Kenyon, " that which happened in this
" case does not fall within the meaning of 'ar-
" rests, restraints, and detainments of kings,
" princes, and people.' The meaning of the
" word *people* may be discovered by the accom-
" panying words, *noscitur a sociis*, it means
" *the ruling power of the country.*"

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2 Bur. 696.

Lord Mansfield has said that the insured may abandon in case, merely, of an arrest or embargo by a prince, not an enemy; and, consequently, such an arrest is a loss within the meaning of the word *detention*.

Park 79. Saloucci v. Johnson, B. R. Hil. 25 Geo. 3.

In case of detention by a foreign power, which, in time of war, may have seized a neutral ship at sea, and carried it into port to be searched for enemy's property, all the charges consequent thereon, must be borne by the underwriter; and whatever costs may arise from an improper detention, must always fall upon him.

2 Vern. 176.

But this rule shall not be extended to cases where the insured shall navigate against the laws of those countries where he may be detained; or to cases where there shall be seizure for non payment of customs. This was so ruled by Lord Commissioner Hutchins in Chancery, in the year 1690; and the reason of it is obvious, because there is a gross fraud on the part of the owner of the property insured; and no man shall take advantage of his own misconduct. If, indeed, any of these acts were committed by the master of the ship without the knowledge of the insured, the underwriter would be liable for a loss by barratry, if not by detention.

Under

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Under a policy on a ship and stores at and from a port in a foreign country, it is now settled, that the insurers are liable for the payment of damage occasioned by the detention or seizure of the ship by the government of the country in the loading port. Rotch v. Edie, 6 T.R. 413.

In the last case, the learned judges desired not to be considered as deciding upon the effect of an embargo laid on by our own sovereign upon ships loading in this country, which point, therefore, remains yet undetermined by proper legal authority, although there appears to be very little doubt concerning the reason of the thing; for the insurer may be equally injured by a detention of his ship in our own ports as in those of a foreign nation.

Fourth, as to losses by barratry of the master or mariners.

Any act of the master or mariners which is of a criminal or fraudulent nature, or which is grossly negligent, tending to their own benefit, and prejudicial to the *owners of the ship*, without their consent or privity, is barratry. 1 Stra. 581. 2 Do. 1173. Cowp. 143. 1 T.R. 123. 7 T.R. 505.

It is immaterial whether the loss take place during the fraudulent voyage, or after the ship shall have returned to the regular course; for the moment she is carried from her right track with an evil intent, barratry is committed. Cowp. 155.

But

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Lockyer & others v. Offley, 1 T.R. 252.

But the loſs muſt happen during the voyage inſured, and within the time limited by the policy, otherwiſe, the underwriters are not liable. Thus, if the captain be guilty of barratry by ſmuggling, and the ſhip afterwards arrive at the port of deſtination, and be there moored at anchor *twenty-four hours in good ſafety*, the underwriters are not liable, if, after this, ſhe ſhould be ſeized for that act of ſmuggling.

Park 84.

To conſtitute barratry, it muſt be without the knowledge or conſent of the owners; becauſe nothing can be ſo clear as this, that no man can complain of an act to which he himſelf is a party. It is material to conſider in what ſenſe the word owner is to be underſtood

Coup. 154.

in this definition. It has been argued, that if A be the owner of a ſhip, and let it out to B as freighter, who inſures it for the voyage, and the deviation be with the knowledge of A, though unknown to B, the inſurer is diſcharged. But that argument was over-ruled, and the court ſaid, that in order to diſcharge the inſurer from the loſs by barratry, it muſt appear, that the act done was by the conſent, or with the privity of the owner, *pro hac vice*, that is, the freighter, the perſon inſured.

Knight v. Cambridge,

The declaration ſtated the ſhip to have been

loſt by the fraud and negligence of the maſter, and the court were unanimouſly of opinion, that it was a ſufficient averment of a loſs by barratry. 2 Ld. Raymond 1349. 1 Stra. 581.

Where a ſhip ſailed a different courſe from that firſt intended, which alteration was publicly notified before her departure, and where the maſter was to have no benefit by the change, it was held not to be barratry. Stamma v. Brown, 2 Stra. 1173.

So, if a ſhip take a prize, and inſtead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize againſt the orders of his owners, the captain is juſtified by neceſſity, and it is not barratry, becauſe not done to defraud the owners. Elton v. Brogden, 2 Stra. 1264.

The Thomas and Matthew was inſured from London to Seville, and was let to freight for the voyage. She ſailed from London to the Downs, and from thence to Guernſey, which was out of the courſe of the voyage. The captain went there to take in wine and brandy on his own account, with the knowledge, it was believed, of the original owner of the ſhip, but not *of the freighter for that voyage*, and therefore the owner, *pro hac vice*. This was held to be barratry. Vallejo and another v. Wheeler, Cowp. 143.

In a ſubſequent caſe, which was an action on a policy on goods on board a ſhip at and from Roſs v. Hunter, 4 T. R. 33.

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from Jamaica to New Orleans, it appeared that ſhe was put up as a general ſhip in Jamaica in 1783; that ſhe ſailed on the voyage inſured in May of the ſame year, and arrived in June following at the mouth of the river Miſſiſſippi, which leads up to New Orleans, in Spaniſh America, at the diſtance of about thirty-five leagues. When the captain had gotten thus far, he dropped anchor, and, on his return, without carrying the ſhip to her port of deſtination, ſtood away for the Havannah, and was never heard of afterwards. It appeared that he had a private adventure of negroes of his own on board, which, there was reaſonable evidence for ſuppoſing, he intended to have ſold at New Orleans; but finding it difficult to do ſo, on account of a prohibition to import them into the Spaniſh government, he went to the Havannah. The jury found for the plaintiffs, on the count in the declaration charging the barratry of the maſter; and the whole court of King's Bench, upon a motion for a new trial, were of opinion, that the facts ſtated amounted clearly to the crime of barratry.

Moſs v. Byrom, 6 T. R. 379.

It has been holden, alſo, that if a captain, contrary to the inſtructions of his owner, cruize for, and take a prize, and the veſſel be after-

afterwards lost in consequence of it, he is guilty of barratry, even though he libel the prize in the Court of Admiralty in the names of himself and his owner; and although the owner had procured letters of marque solely with a view to encourage seamen to enter, without any intention of using them for the purpose of cruizing; for, whatever is done by the captain to defeat or delay the performance of the voyage, is barratry in him, being to the prejudice of his owners. Although the captain might conceive that what he did was for the benefit of his owners, yet, if he acted contrary to his instructions and duty to them, it is barratry.

Notwithstanding the above uniformity of decisions, it has been contended, that if a vessel deviated from the voyage insured through the ignorance of the captain, it amounted to barratry. The jury in this case, had found that there was no fraud; and the Court of King's Bench, after considerable argument, were unanimously of opinion, that there must be fraud to constitute barratry, and that the jury, by negativing fraud, had, in truth, negatived barratry.

Phyn v. the Roy. Ex. Ass. Com. 7T. R. 505.

An act of the captain, with the knowledge of the owner of the ship, though without the privity

Nutt v. Bourdieu, 1 T.R. 323.

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privity of the owner of the goods, who was the perſon inſured, is not barratry.

If the maſter of the ſhip be alſo the owner, he cannot be guilty of barratry.

Ante 135. Vallejo v. Wheeler.

But a man may be an owner, *pro hac vice*, who is not the original owner of the ſhip.

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If the owner be alſo the maſter of the ſhip, it is clear, that any act, which in another maſter would be conſtrued barratry, cannot be ſo in him; becauſe no man ſhall be allowed to derive a benefit from his own crime, which he would do, were he to recover againſt the inſurers for a loſs occaſioned by his own act.

Roſs v. Hunter, ante 135.

But where it was proved that the perſon deſcribed in the policy as maſter, and who was treated with as ſuch, carried the ſhip out of her courſe for fraudulent purpoſes of his own, it was holden to be, *prima facie*, evidence of barratry, and that it lay upon the inſurer, in order to diſcharge himſelf, to ſhew that the perſon ſo acting as maſter, was alſo the owner or freighter of the veſſel.

Lewin v. Suaſſo, Chancery, 16 Geo. 2. Poſt. Dict. 1 vol. 147.

This rule reſpecting the ſame perſon being both owner and maſter, has been extended in the Court of Chancery to a caſe where ſuch an owner and maſter, after mortgaging his ſhip, had committed barratry, and where the mortgagee brought an action at law againſt the

the inſurer to recover damages for the loſs he had ſuſtained by this act of barratry: the court ſtill conſidering the owner as the mortgagor, granted an injunction. In this caſe, Lord Hardwicke ſaid, that "barratry is an act "of wrong done by the maſter againſt the "ſhip and goods: and this being the caſe of a "ſhip, the queſtion will be, who is to be "conſidered as the owner? Several caſes "might be put where barratry may be aſſigned "as the breach of an inſurance; and barratry, "or not, is a queſtion properly determinable "at law: but in this caſe it is not ſo, for "courts of law will not conſider a mortgagor "as having any right or intereſt in the thing "mortgaged, and a man may frequently come "into equity for relief in reſpect of a part, "only, of his caſe." CHAP. VI

If the parties inſert in a policy that the inſurance ſhall be upon the ſhip in any lawful trade, if the captain commit barratry by ſmuggling, the underwriters are anſwerable. For, otherwiſe, the word barratry ſhould be ſtruck out of the policy; and moſt clearly, the ſtipulation in the policy reſpecting the employment of the ſhip in a lawful trade, muſt be applied to the *trade in which the owners employ her.* Havelook v. Hancill upon demurrer, 3 T.R.277.

Barratry has been conſidered, hitherto, as it affects

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affects the rights of the insurer and insured, not as a crime which ought to be severely punished; and we do not find that any punishment was expressly provided by the law of England for offences of this nature till the reign of Queen Anne.

1 Anne, stat. 2. ch. 9. s. 4.

This statute ordains "that if any captain, "master, mariner, or other officer belonging "to any ship shall wilfully cast away, burn, or "otherwise destroy any ship unto which he be- "longeth, or procure the same to be done, to "the prejudice of the owner or owners there- "of, or of any merchant or merchants that "shall load goods thereon, he shall suffer "death as a felon."

4 Geo. 1. ch. 12. sec. 3.

By a subsequent statute it was declared, that "if any owner of, or captain, master, mariner "or other officer belonging to any ship, shall "wilfully cast away, burn, or otherwise de- "stroy the ship of which he is owner, or unto "which he belongeth, or in any manner di- "rect or procure the same to be done, to the "prejudice of any person or persons that shall "underwrite any policy or policies of insur- "ance thereon, or of any merchant or mer- "chants that shall load goods thereon, he shall "suffer death."

11 Geo. 1.

It was afterwards enacted, "that if any "owner

" owner of, or captain, maſter, officer, or CHAP. VI.
" mariner belonging to any ſhip or veſſel, ſhall ch. 29. ſec. 6.
" wilfully caſt away, burn, or otherwiſe de-
" ſtroy the ſhip or veſſel of which he is owner,
" or to which he belongeth; or in any wiſe
" direct or procure the ſame to be done, with
" intent or deſign to prejudice any perſon or
" perſons that hath underwrote, or ſhall un-
" derwrite, any policy or policies of inſurance
" thereon, or of any merchant or merchants
" that ſhall load goods thereon, or of any
" owner or owners of ſuch ſhip or veſſel, the
" perſon or perſons offending therein, being
" thereof lawfully convicted, ſhall be deemed
" and adjudged a felon or felons, and ſhall
" ſuffer, as in caſes of felony, without benefit
" of clergy."

The ſeventh ſection directs, that if the offence be committed within the body of a county, the ſame ſhall be tried as all felonies are, in the common law courts; but if upon the high ſeas, then, agreeably to the directions of the 28 Hen. 8. chap. 15.

In ſpeaking of a total loſs, it is not always meant to ſignify that the property inſured is irrecoverably loſt or gone: but that, by ſome of the perils mentioned in the policy, it is in ſuch a condition as to be of little uſe or value

to

CHAP. VI.

2 Bur. 1170.

to the insured; and so much injured as to justify him in abandoning to the insurer, and in calling on him to pay the whole amount of his insurance, as if a total loss had actually happened. But the idea of a total loss, in this sense of the word, is so intimately blended and interwoven with the doctrine of abandonment, that it will add much to clearness and precision to treat it under that head.

Park 98.

Do. 143.

The word abandonment, then, imports, that the whole property is not lost; for it is impossible to cede or abandon that which does not exist; and before a person insured can demand from the underwriter a recompense for a total loss, he must abandon to him whatever claims he may have to the property insured.

2 Bur. 1209.

The right to abandon must arise upon the object of the insured being so far defeated that it is not worth his while to pursue it: such a loss as is equally inconvenient to him as if it had been total. For instance, if the voyage be absolutely lost, or not worth pursuing; if the salvage be very high, *suppose a half*; if further expence be necessary; if the insurers will not engage, at all events, to bear that expence, though it should exceed the value, or fail of success: under these and other like

Park 145.

circum-

circumſtances, the inſured may diſentangle himſelf, and abandon, notwithſtanding there may have been a re-capture. CHAP. VI.

But although in all caſes the inſured has a right to ſay he will not abandon; yet, he cannot, at his pleaſure, haraſs the inſurer, by ſaying he will abandon, and thereby turn that, which, in its own nature, was only a partial, into a general loſs. 2 Burr. 697.

A ſhip might be taken, and eſcape immediately, which would be no hindrance to the voyage; or ſhe might be taken, and inſtantly ranſomed, which would amount only to a partial loſs; in which caſes the inſurer ſhall not be allowed to demand a recompenſe for a total loſs. 2 Bur. 1213.

It will appear ſufficiently evident, that the owner cannot abandon, unleſs at ſome period or other of the voyage, there has been a total loſs; and if neither the ſhip, or the voyage, be loſt, that is not a total loſs. 1 T. R. 187. Cazalet and others v. St. Barbe.

The abandonment muſt be total, and not partial; and the right to abandon muſt depend on the nature of the caſe, at the time of the action brought, or of the offer to abandon; becauſe an inſurer ought never to pay leſs, upon a contract of indemnity, than the value Park 144, 5.

of

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of the loſs; nor ought the inſured ever to gain more.

Mitchell v. Edie, 1 T.R.608.

When the inſured receive intelligence of ſuch a loſs as intitles them to abandon, they muſt make their election in the firſt inſtance; and if they abandon, they muſt give the underwriters notice, in a reaſonable time, otherwiſe they waive their right to abandon, and can only recover as for an average loſs.

Da Coſta v. Newnham, 2 T.R.407.

But if the inſured, hearing that his ſhip is much diſabled, and has put into port to repair, expreſs his deſire to the underwriters to abandon, and be diſſuaded from it by them, and they order the repairs to be made, they are liable to the owner for all the ſubſequent damages, occaſioned by that refuſal, though it ſhould amount to the whole ſum inſured. For the reaſon why the notice of abandonment is deemed neceſſary, is to prevent ſurpriſe or fraud upon the underwriter; but in this caſe they have, by their own act, ſuperſeded the neceſſity of notice.

Hodgſon & another v. Blackiſton, Sitt. after Hil. Term, 38 Geo. 3. K. B. Park 172.

It was held, that a notice of abandonment was neceſſary, though the ſhip and cargo had been ſold, and converted into money, when the notice of the loſs was received.

The ſhip *Succeſs*, from *London* to *Bermudas*, and

and ſo to *Carolina*, was taken by a Spaniſh privateer, and carried into Boſton in New England, where, as no perſon appeared to give ſecurity for the ſalvage, ſhe was condemned and ſold in the court of admiralty there; the re-captors had their moiety, and the overplus remaining in the hands of the officers of the court, the owners were intitled to abandon, and to recover for a total loſs.

Pringle v. Hartley, in Chancery, 3 Atk. 195.

A ſhip was taken by the French, and afterwards re-taken, having remained in their poſſeſſion eight days. The maſter, mates and ſailors, except a landman and apprentice, had been taken out and carried to France. Before the capture the ſhip had been ſeparated from her convoy, and was ſo far diſabled by a ſtorm, as to be incapable of proceeding in her voyage, without going to port to refit. Part of the cargo had been thrown overboard, and the reſt was ſpoiled while the ſhip lay at Milford Haven, where ſhe had been brought in. This was held to be a total loſs, ſo as to intitle the owner to abandon, in actions upon two policies, one on the ſhip, and another on the cargo.

Goſs v. Withers, 2 Burr. 683.

The *Hope*, bound from *Montſerrat* to *London*, was captured by two American privateers, who took the captain and all the crew, rigging,

Miles v. Fletcher, Dougl. 219.

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and part of the cargo, which conſiſted of ſugars, out of her. She was afterwards retaken and carried into New York, where the captain alſo arrived, and, taking poſſeſſion of her, found that part of the cargo that was left had been waſhed overboard; that 57 hogſheads of what remained were damaged, and that the ſhip was leaky, and in ſuch a ſtate that ſhe could not be repaired without unloading her entirely. The owners had not any ſtorehouſes at New York, or agent to adviſe or direct the captain, nor were any ſailors to be had. The ſalvage came to the value of 40 hogſheads of ſugar, and if he had repaired the ſhip, his expences would have exceeded the freight by 100l. There was an embargo on all veſſels until December, and this ſhip was to have arrived in London in July preceding. The captain, upon the advice of his friends, ſold the cargo, and was paid for it; he agreed alſo to ſell the ſhip; but the perſon who had contracted for her ran away, whereupon the captain left her in a creek, and came to England. Lord Mansfield told the jury, that if they were ſatisfied the captain had done what was beſt for the benefit of all concerned, they muſt find as for a total loſs; which they accordingly did, the plaintiffs having offered to abandon.

If,

If, at the time advice is received of the loss, it appears that the peril is over, and the thing in safety, the insured has no right to abandon. Thus, in a case where there was a capture and re-capture, and it was stated at the time of the offer to abandon, that the ship was safe in port, and had sustained no damage, the court held that the insured had no right to abandon. Hamilton v. Mendez, 2 Bur. 1 98. 1 Bl. Rep. 276.

Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates, or enemies: and is also sometimes used to signify the thing itself which is saved; but it is in the former sense only that it is here used. Beawes's Lex Merc. 146.

Underwriters, by their policy, expressly undertake to bear all expences of salvage. Park 140.

If an insurer pay money for a total loss, and in fact, it be so at the time of adjustment, if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured. But equal justice is done by putting the insurer in his place, with all the advantages that may arise from the salvage. 4 Burr. 1966.

Lord Chief Justice Holt held, that the defendants, in an action brought for goods detained for 4l. salvage, having been saved out of a ship that took fire, might retain the goods Hartford v. Jones, 1 Ld. Raymond, 393. 2 Salk. 654.

CHAP. VI. till payment of the ſalvage, as well as a taylor, an oſtler, or a common carrier; it being reaſonable that a man ſhould be rewarded who hazards his life in the ſervice of another.

The ſtatute 12 Ann. ſtat. 2. chap. 18. ſec. 1. enacted, that if a ſhip was in danger of being ſtranded, or run aſhore, the ſheriffs, juſtices, mayors, conſtables, or officers of the cuſtoms, neareſt the place of danger, ſhould ſummon as many men as ſhould be thought neceſſary for the preſervation of the ſhip and cargo, and that if any ſhip, man of war, or merchantman, ſhould be riding at anchor near the place, aſſiſtance might be demanded of the ſuperior officer of ſuch ſhip, of his boats and men, as many as could be ſpared, under a penalty of 100l. in caſe of refuſal.

Sect. 2. And the ſecond ſection goes on to ſay, that all perſons concerned in lending aſſiſtance ſhall be paid a reaſonable reward, and keep the ſhip ſaved in cuſtody till paid. In caſe of diſpute, as to the quantum, the parties to nominate three neighbouring juſtices of the peace, to decide the ſame; and ſuch adjuſtment ſhall be binding and recoverable by action at law. If no perſon appears to make claim, then three juſtices, on application, to put ſome perſon into poſſeſſion, taking an account in writing of the

the goods, &c. which, if not claimed within twelve months, to be publicly sold, and the residue, after deducting charges, &c. to be transmitted to the Exchequer, to remain for the benefit of the rightful owner, who, on affidavit, or other proof of his right to the property, to the satisfaction of one of the Barons of the Coif, shall, on his order, receive the same. Sect. 3, 4, and 5, relate to the punishment of depredators. CHAP. VI.

This act was made perpetual by the 4th Geo. 1. chap. 12. 4 Geo. 1. ch. 12.

This statute has further added to the mode of adjusting the salvage, and punishment of offenders: and the statute 33 Geo. 3. ch. 66. sec. 42. has fixed the rate of salvage, in cases of re-capture by any of his Majesty's ships, to be one eighth; and one sixth, if made by a privateer or other ship. 26 Geo. 2. ch. 19.

Wearing apparel of the master and seamen is always excepted from the allowance of salvage; and the valuation of the ship and goods, in order to ascertain the rate of salvage, may be determined by the policy; or, if there is reason to suspect an undervalue, by the invoices, and the salvers must be paid accordingly. Beawes's Lex Merc. 147.

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Park 140.

In order to intitle the insured to recover the expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy.

Carey v. King, in Temp. Hardwicke, 304.

Thus, in a declaration on a policy for insuring goods, it was stated that a ship sprung a leak and sunk in the river, whereby the goods were spoiled. Lord Hardwicke held, that under this declaration, the plaintiffs might give in evidence the expences of salvage.

Randal v. Cockran, 1 Ves. 98.

Yet if the insurer should have paid to the insured the expences of salvage, and, from particular circumstances, the loss should be afterwards repaired by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss.

De Costa v. Frith, 4 Bur. 1966.

A box of bullion was wholly lost, the loss adjusted and paid, and an agreement was entered into, at the time of adjustment, that the insured would refund to the insurer whatever he should recover, in such proportion as the sum insured bore to the whole interest. The bullion having been afterwards fished up, the insured paid into court the insurer's proportion, after deducting salvage, which was held to be right.

We

We come now to the conſideration of partial loſs, or, as it is ſometimes called, average loſs, which implies a damage "ex vi terminis," that the ſhip may have ſuſtained in the courſe of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it alſo means the damage which goods may have received, without any fault of the maſter, by ſtorm, capture, ſtranding, or ſhipwreck, although the whole, or the greater part thereof, may arrive in port. CHAP. VI.

Theſe partial loſſes fall upon the owners of the property ſo damaged, who muſt be indemnified by the underwriter. For, if the goods arrive, but leſſened in value, through damage received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it can only be effected *by putting the merchant in the ſame condition in which he would have been, if the goods had arrived free from damage.* 2 Bur. 1172.

But when a man inſures one ſpecies of property, he cannot recover damage occaſioned by the loſs of a ſpecies of property different from that named in the policy. Thus, under a policy *upon the ſhip*, or *upon the goods*, the inſured cannot recover *extraordinary wages* paid to ſeamen, or *proviſions* expended during a detention to repair, or a detention by an embargo. Park 53.

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bargo. Nor is the underwriter *on goods* liable for the *freight* paid by the owner of the goods to the proprietors of the ſhip, where the goods were partially loſt.

Ante 33. Neither is an underwriter, upon *ſhip and goods*, liable for the charge of demurrage.

3 Bur. 1555. Average in policies has two ſignifications; for it means "a contribution to a general "loſs," and is alſo uſed to ſignify "a particular "partial loſs." In the latter caſe the value in the policy can be no guide to aſcertain the damage; for that muſt neceſſarily become a ſubject of proof, as much as in the caſe of an open policy.

Park 102.

2 Bur. 1170. When a partial loſs happens, the queſtion ariſes, how the proportion of damage is to be aſcertained? It certainly cannot be by any meaſure taken from the prime coſt, but it may be done in this way. Where an entire thing, as one hogſhead of ſugar, happens to be ſpoiled, if you can fix, whether it be a third, a fourth, or a fifth worſe, then the damage is aſcertained to a mathematical certainty. How is this to be found out? Not by any price at the port of *diſcharge*, but it muſt be at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is

is the same thing; for in either case it equally shews, whether the damaged goods are a third, a fourth, or a fifth, worse than if they had come sound: consequently, whether the injury sustained be a third, fourth, or fifth, of the value of the thing. And as the insurer pays the whole prime cost, if the thing be wholly lost, so, if it be only a third, fourth, or fifth, worse, he pays a third, fourth, or fifth, not of the value for which it sold, but of the value stated in the policy. And when no valuation is stated in the policy, the invoice of the cost, with the addition of all charges, and the premium of insurance, shall be the foundation upon which the loss shall be computed.

1 Magens, 37.

Lord Mansfield said, that the case of Lewis v. Rucker should be the rule in all similar cases, that is, wherever there is a specific description of casks or goods; but, in a subsequent case, the property, which consisted of various goods, taken from an enemy, was valued at the sum insured, and part was lost by perils of the sea, consequently the same rule could not be adopted, on account of the nature of the thing insured. The only mode was to go into an account of the whole value of the goods, and take a proportion of the sum as the amount of the goods lost. In a later case,

Post quoted in Johnstone v. Sheddon.

Le Cras v. Hughes, B. R. East. 22 Geo. 3. Park 110.

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theſe rules, ſo fraught with good ſenſe, ſo very comprehenſive and intelligible, have, if poſſible, received a ſtill more clear and preciſe elucidation.

Johnſtone v. Sheddon, Sitt. after Trin. Term 40 Geo. 3. at Guildh. before Lord Kenyon.

The counſel for the plaintiff obſerved, that if the queſtion in this cauſe deſerved to be called by that name, it was certainly of great importance that it ſhould be ſettled by the authority of his Lordſhip, and of a reſpectable jury of gentlemen converſant in the commercial world. He took the liberty of uſing that expreſſion, becauſe, from the beſt attention he had been able to pay to it, (moſt ably aſſiſted in the conſideration of it), he had not been able to bring his mind to entertain a doubt on the ſubject. He did not ſay that was of any conſequence; he ſpoke in the preſence of thoſe, and to thoſe, who were infinitely better able to judge of queſtions of that ſort than he could pretend to be. But if there were any doubts upon the point, it was extremely fit thoſe doubts ſhould be removed, and that the commercial world might know what was to be the rule in future, in a queſtion of vaſt importance to the public. He ſaid, he was only about to bring to their recollection the rule which had been laid down moſt ably and moſt diſtinctly by his Lordſhip's noble and learned predeceſſor,

for, the Earl of Mansfield, in a similar case. CHAP. VI.
The single question, between these parties, was upon the manner of settling an average loss, a question which for many years had not been heard in Guildhall. The defendant, Mr. Sheddon, underwrote 100l. on this policy, and the plaintiff said he had a right to claim 76l. 7s. 4d. per cent. as an average loss, upon a quantity of a cargo of brimstone, which came to market in a deteriorated state. Mr. Sheddon had paid into court 25l. per cent. insisting that was all he was liable to pay. The question was, by what rule or measure the average was to be calculated. The plaintiff contended, that as a policy of insurance was a contract of indemnity, and that as the underwriters, for a certain premium, undertook to indemnify him against any loss to that cargo, *if part of it came to the market sound, and another part came in a deteriorated state, he had a right to consider the invoice price of that which was in a deteriorated state, to consider its value at the port of delivery, compared with that which was in a sound state, and from thence to draw the average.* On the other hand, it was to be insisted, that the *whole of the cargo, sound and unsound, ought to be brought into hotch-potch, and then to consider what the loss would be.* The plaintiff insisted

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that rule would be moſt unjuſt and inconvenient; that this being a contract of indemnity, he had nothing to do with the fluctuation of the price, or whether it arrived at a riſing or a falling market; and that the party who had entered into this contract, had a right to look at the invoice price of the commodity; in other words, You have promiſed, that if my cargo of brimſtone ſhall not arrive at the port of delivery in a ſound ſtate, you will indemnify me againſt that loſs. A large portion of it had arrived in a ſound ſtate, and there was no diſpute on that. It was on that part that arrived in a deteriorated ſtate that the queſtion aroſe.

Lord Kenyon here aſked, if the plaintiff was inſured up to the extent of the whole cargo?

The Counſel ſaid, Yes. He ſhould read a part of what Lord Mansfield had ſaid on this ſubject, and ſhould then call a moſt intelligent man, who would tell them the mode in which it was ſettled. He ſhould not ſtate to them his evidence, inaſmuch as he had adopted his ſentiments very much from him. The learned counſel here cited and commented on the moſt material parts of the caſe of Lewis v. Rucker. The circumſtances of that caſe were

2 Bur. 1167. Park 104.

were shortly these: It was an action brought on a policy, by the plaintiffs, for Mr. James Bourdieu, upon the goods on board a ship called the Vrow Martha, at and from St. Thomas's Island to Hamburgh, from the loading at St. Thomas's Island till the ship should arrive and land the goods at Hamburgh. The goods, which consisted of sugars and indigo, were valued; the clayed sugars at 30l. per hogshead. In the course of the voyage the sea-water got in, and, when the ship arrived at Hamburgh, it appeared every hogshead of sugar was damaged, and it was necessary to sell them immediately. The difference, between the price which they brought, and what they would have brought if sound, was as 20l. 0s. 8d. per hogshead was to 23l. 7s. 8d. The defendant paid money into court, by the following rule of estimating the damage. He paid the like proportion of the sum at which the sugars were valued in the policy, as the price of the damaged sugars bore to sound sugars at Hamburgh, the port of delivery. It appeared in this case, that Mr. Bourdieu might afterwards have sold these sugars at 30l. per hogshead, if they had been kept according to his orders; and the only reason why they were not kept, was from the sea-water that got in; and

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and therefore it was inſiſted, that the neceſſity of an immediate ſale, and the conſequences of it, ought to be computed into the damage. The jury found a verdict for the defendant; and a rule having been obtained to ſhew cauſe why there ſhould not be a new trial, the court, after hearing the matter fully debated, took time to adviſe, and their unanimous opinion was delivered by Lord Mansfield, who, among other things, ſaid, "The defendant takes the "proportion of the difference between ſound "and damaged at the port of delivery, and "pays that proportion upon the value of the "goods ſpecified in the policy; and has no "regard to the price in money, which either "the ſound or the damaged goods bore in the "port of delivery. He ſays, the proportion "of the difference is equally the rule, whe-"ther the goods come to a riſing or a falling "market. For inſtance, ſuppoſe the value in "the policy to be 30l. the goods are damaged, "but ſell for 40l. if they had been ſound, they "would have ſold for 50l. The difference "then between the ſound and damaged is a "fifth; conſequently the inſurer muſt pay a "fifth of the prime coſt, or value in the po-"licy, that is, 6l. *e converſo*, if they come to "a loſing market, and ſell for 10l. being da-"maged,

" maged, but would have ſold for 20l. if
" found, the difference is one half, the inſurer
" muſt pay half the prime coſt, or value on
" the policy, that is 15l." His Lordſhip, after ſtating and anſwering the objections made to that rule, proceeded as follows: " In oppoſition to the meaſure the jury have gone
" by, the plaintiffs contended, that they ought
" to be paid the whole value in the policy
" upon on of two grounds. 1ſt, Becauſe the
" general rule of eſtimating ſhould be the difference between the price the damaged
" goods ſell for, and the prime coſt or value
" in the policy. Here the damaged ſold at
" 20l. os. 8d. per hogſhead; and the underwriter ſhould make it up 30l. To this I
" anſwer, that it is impoſſible that ſhould be
" the rule; it would involve the underwriter
" in the riſe or fall of the market; it would
" ſubject him, in ſome caſes, to pay vaſtly
" more than the loſs; in others, it would deprive the inſured of any ſatisfaction, though
" there was a loſs. For inſtance, ſuppoſe the
" prime coſt, or value in the policy, 30l. per
" hogſhead, the ſugars are injured, the price
" of the beſt is 20l. per hogſhead; the price
" of the damaged is 19l. 10s. the loſs is about
" a fortieth,

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"a fortieth, and the inſurer would be to pay "above a third. Suppoſe they come to a ri- "ſing market, and the ſound ſugars ſell for "40l. a hogſhead, and the damaged for 35l. "the loſs is an eighth, yet the inſurer would "be to pay nothing. The ſecond ground, "upon which the plaintiffs contended that "the 30l. ſhould be made up, is, that it ap- "pears the ſugars would have ſold for that "price if the damage from the ſea-water had "not made an immediate ſale neceſſary. We "are of opinion, that the plaintiffs are not in- "titled to have the price for which the da- "maged ſugars were ſold made up 30l. per "hogſhead; and it ſeems to us as plain as any "propoſition in Euclid, that the rule by "which the jury have gone is the right mea- "ſure." What is it that the party has loſt in this caſe? He has loſt what he would have got if his cargo had come to the market without being damaged. He has loſt what he would have put into his pocket if the cargo had arrived in a ſound ſtate. The ſubject ſeemed to him to be ſo clearly laid down by Lord Mansfield, that nothing could be added to it.

Lord Kenyon.—"Suppoſe one hogſhead to "have

" have been washed off deck, and all the rest CHAP. VI.
" to have arrived safe, could the verdict be
" for more than the value of that hogshead?"

The counsel for the defendant said, they were perfectly agreed on every one of the principles in Lewis v. Rucker.

The counsel for the plaintiff asked what it was then they disagreed about.

Both sides admitted that the rule laid down in Lewis v. Rucker was the measure according to which the average ought to be calculated; and yet the result, according to the plaintiff, was 76l. 7s. 4d. per cent. and according to the defendant only 25l. which he had paid into court.

Mr. Oliphant was the only witness called on the part of the plaintiff. He said he had been in the constant habit of settling average losses, and had attended very frequently on special juries in that place. He had settled the average loss in question. A paper was here handed up to him, which, he said, was his statement of the average in question, and was his own hand-writing. The whole invoice price of the cargo was 1352l. without premium and costs. When these were added, the amount was 1765l. The principle on which he went was this:—*The insured stood covered only*

CHAP. VI. *only for their invoice amount, and for the premium and charges incurred on that, at the time of ſhipping.* He did not conſider that any thing more was at the riſk of the inſured, and of the underwriters. Immediately upon the arrival or delivery of the goods, he conſidered the riſk terminated between the parties, and that it was neceſſary to aſcertain the value of the goods ſo delivered at that moment.

Lord Kenyon.—"That is to conſider the intrinſic value of the goods as they were when "the invoice was made out?"

Mr. Oliphant.—"No, my Lord. To aſcertain the value of the articles at the port "of delivery the moment the riſk is ended, "and previous to any other charges of duty, "or any expence being incurred which were "not in the contemplation of the parties at "the time of the inſurance."

Lord Kenyon.—"Suppoſing the goods were "become of greater value at the port of deliver, but ſtill damaged; ſuppoſe, in fact, "they had received ſome damage in the "courſe of the voyage, but when arrived at "the port of delivery they are of more value "than the invoice price, can there be no loſs "then aſked for?"

Witneſs.—"O yes, my Lord, a conſiderable "loſs,

" loſs, and the very object of my inquiry is
" what that loſs amounts to. In order to
" aſcertain this, I muſt learn what the value
" of the damaged goods is at that time, and
" what they would have been worth if they
" had arrived ſound. I conſider it neceſſary
" to determine this before any duty or ſubor-
" dinate charges are incurred, becauſe what-
" ever additions may be made poſterior to the
" termination of the riſk, tending to enhance
" the price, they have, in my opinion, nothing
" to do with the average. The additional
" price is a mere reimburſement of my ad-
" vances. By deducting them, therefore, from
" the groſs price, I find the true value of the
" commodity. It is impoſſible to aſcertain
" the quantum of the damage, but by com-
" paring the price of the ſound and unſound
" commodity at the port of delivery, and then
" comparing that difference with the invoice
" price, in order to aſcertain what proportion
" of it it amounted to. He ſaid, he only uſed
" the market to aſcertain the *quantum* of
" damage. *If the ſound goods were worth* 1000*l.*
" *and the damaged were worth* 500*l. he demanded*
" *only one-half; that is, of the invoice or original*
" *price.* He was extremely ſorry to differ in
" opinion with ſome very reſpectable gentle-
" men

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"men at Lloyd's; but when his employers "repoſed a confidence in his judgment, he "thought it his duty to adhere to his own "until that judgment was convinced. He "ſaid he might be wrong, but he was then in "that place where he ſhould receive informa- "tion if he was, and to that he would bow "with reſpect. He wiſhed to explain where "their difference aroſe, and it was in this "way:—When a hogſhead of tobacco ar- "rived at the port of delivery, he preſumed "he had a right to ſell it that inſtant, before "the duties were incurred. He ſold it for "50l. and he ſold the damaged for 25l. In "that caſe he claimed one-half. The others "contended that he ought to pay the duties. "The duties payable on ſound and damaged "commodities were in ſome caſes exactly the "ſame. He could not admit into his calcu- "lation any expence that had been incurred "poſterior to the termination of the riſk. By "the rule laid down by Lord Mansfield, in "Lewis and Rucker, the average loſs in this "caſe was 76l. 7s. 4d. But by their taking "into the computation that with which they "had nothing to do, they made it but 25l. per "cent. In making his calculation he had "gone in the moſt ſtrict and liberal manner "according

" according to Lord Mansfield's opinion in CHAP. VI.
" caſe of Lewis and Rucker. He invariably
" protected the underwriters againſt the effect
" of the market, and on this principle it pro-
" duced 76l. 7s. 4d. per cent. If the whole
" of the duties, freight, and other charges
" were added to the damaged, which were
" added to the ſound, it would diminiſh the
" average very conſiderably. An article might
" be delivered to him diminiſhed in its intrinſic
" value only one-fifth, but that was not his
" damage. His damage was determined by
" what came net into his pocket from the da-
" maged goods, compared with what he would
" have received net if they had been ſound,
" and taking ſuch a proportion as they bore
" to each other out of the *ſum inſured*. The
" loſs ſuſtained by the duty being the ſame
" on the damaged as the ſound, was, in his
" humble opinion, a certain effect of the
" damage, and ought to be made good by the
" underwriter. That average of 76l. 7s. 4d.
" did not nearly indemnify the inſured for
" the loſs which he had actually ſuſtained.
" He had ſuffered an infinitely heavier loſs,
" but he could claim no more."

On croſs-examination Mr. Oliphant ſaid, the ſound part of the brimſtone ſold for 22l.

CHAP. VI. per ton, and the damaged for 17l. There was a very great difference between value and price. The value was that which came net into his pocket.

Lord Kenyon here ſaid, that he could not forbear thinking that what Mr. Oliphant had ſaid was as clear as the ſun.

Mr. Gibbs obſerved, that it was rather an intricate queſtion.

Lord Kenyon ſaid, he could find no intricacy in it. Mr. Oliphant ſaid, the 22l. which was the groſs price of the ſound brimſtone, and the 17l. that of the damaged, included duty, freight, and other charges. The duties and freight on the damaged were the ſame as on the ſound. But the damaged and ſound were taken free from the duties, then they would bear the proportions he had ſtated. If this had been ſold for exportation, it would have ſold for the ſame ſum if the duties were paid, becauſe there would have been a drawback. If he had ſold theſe goods on board a ſhip, as many articles were ſold, before any duty was paid, he ſhould have made exactly that average. But the duty being paid, he muſt ſtrip the duty and charge from it. Mr. Sheddon was a very intelligent and reſpectable gentleman, but he could not adopt his opinion.

After the counsel for the defendant had been heard in support of his mode of calculation, and after he had examined two witnesses whose evidence did not bear very closely on the question,

Lord Kenyon said—"It does seem to me "that the ground on which Mr. Oliphant "goes is extremely clear, and seems to be ad- "mitted by the parties on one side and on the "other. Whether there is any mistake in "the figures or not, I will not presume to "say."

Verdict for plaintiff 51l. 7s. 4d. which, together with the 25l. paid into court, made the amount of the plaintiff's demand, 76l. 7s 4d.

In case of a total loss, the constant usage has been since the 19 Geo. 2. to let the valuation fixed in the policy remain; unless the plaintiff had a colourable interest only, or had greatly overvalued the goods: but a partial loss opens the policy. Lord Mansfield said this custom was introduced by Lord Chief Justice Lee in Erasmus v. Banks; and the same rule was adopted in Smith v. Flexney, which happened about the same period. M. 21 Geo. 2

Some goods being of a perishable nature, the underwriters in London have, by express words inserted in their policy, declared that they

CHAP. VI. they will not be anſwerable for any partial loſs happening to corn, fiſh, ſalt, fruit, flour and ſeed, unleſs it ariſe by way of a general average, or in conſequence of the ſhip being ſtranded. This clauſe was introduced to prevent the vexation of trifling demands which muſt have ariſen in every voyage on account of the very periſhable nature of the above commodities. This form was formerly uſed by the two inſurance companies, as well as by private inſurers, (who ſtill continue it,) till the year 1754, when a ſhip having been ſtranded, and got off again, the inſured recovered a ſmall partial loſs againſt the London Aſſurance Company, ſince which period the companies have left out the words "*or the ſhip be ſtranded*;" and are now only liable in caſes of a general average.

Cantillon v. the London Aſſ. Com. cited in 3 Bur. 1555.

There have been ſeveral determinations on this clauſe, in all of which it has been uniformly held, that the underwriters can, in no caſe, be anſwerable for a partial loſs to ſuch commodities: and that no loſs ſhall be deemed a total one but the abſolute deſtruction of the thing inſured; for that, while it ſpecifically remains, though, perhaps, wholly unfit for uſe, no loſs has happened within the meaning of this memorandum.

Corn

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Corn is a general term, and includes many particulars; peas, beans, and malt, have been held to come within the meaning of the word.

Mason v. Skurray, Sittings after Hil. 1782, at Guildhall

Mr. Justice Wilson was of opinion, that the term salt, used in the memorandum, did not include saltpetre.

Journu v. Bourdieu, Sitt. after East. Term, 27 Geo. 3.

A cargo of wheat having been partially damaged in a storm, to the amount of 56l. 19s. 8d. per cent. the question was, whether the plaintiff could recover in this action for the partial damage, though the ship had not been stranded; but the court gave judgment for the defendant.

Wilson v. Smith, 3 Bur. 1550.

The same with respect to a cargo of fish, which was stinking, and of no value when examined.

Cocking v. Fraser, B. R. East. 25 Geo. 3.

So, also, in an insurance on fruit from Lisbon to London.

M'Andrews v. Vaughan, Sittings at Guild. after Mich. 1793.

A vessel laden with fruit, in the course of her voyage struck upon a sunken rock, in consequence whereof several of her planks were started; and the water flowed into the hold, and over the cargo. The ship received no damage in consequence of the stranding. Part of the damage the cargo received was occasioned by the water flowing in previous to her being laid on the beach, and part by what flowed in afterwards. Lord Kenyon said,

Burnett v. Kensington, 7 T. R. 210.

CHAP. VI. "The words of this policy are in general terms, "including all cafes; then comes this memo- "randum, 'corn, fruit, &c. unleſs general, "or the ſhip be ſtranded.' This, therefore, "lets in a general average; and I do not "know how to conſtrue the words gramma- "tically but by ſaying, that if the ſhip be "ſtranded, then it deſtroys the exception, and "lets in the general words of the policy. If "a general proviſion be made in any deed or "inſtrument, and it is there ſaid that certain "things ſhall be excepted, unleſs another thing "happen which gives effect to the general "operation of the deed, if that other thing do "happen, it deſtroys the exception altoge- "ther."

Maſon v. Sharpy, ante 169. A cargo of peas was ſo much damaged that the produce was three-fourths leſs than the freight; but as it, in fact, arrived at the port of deſtination, the underwriter was holden not to be liable.

Park 121. General, or groſs average, ſignifies a contribution to a general loſs.

Magens 55. Whatever the maſter of a ſhip in diſtreſs, with the advice of his officers and ſailors, deliberately reſolves to do for the preſervation of the whole, in cutting away maſts or cables, or in throwing goods overboard to lighten his veſſel,

veſſel, which is what is meant by jettiſon, or jetſon, is in all places permitted to be brought into a general or groſs average; in which all who are concerned in ſhip, freight, and cargo, are to bear an equal or proportional part of the loſs of what was ſo ſacrificed for the common welfare; and it muſt be made good by the inſurers in ſuch proportions as they have underwritten. CHAP. VI.

If the ſhip ride out the ſtorm and arrive in ſafety at the deſtined port, the captain muſt make regular proteſts, and muſt ſwear jointly with ſome of the crew that the goods were caſt overboard for no other cauſe but the ſafety of the ſhip and the reſt of the cargo. The law authoriſes and protects thoſe who act bona fide, and will indemnify them againſt all conſequences. Beawes 1, 8.

All loſſes ſuſtained, and expences incurred, voluntarily and deliberately, with a view to prevent a total loſs of the ſhip and cargo, ought to be equally borne by the ſhip, freight, and her remaining lading. Such, for inſtance, is the damage ſuſtained in defending a ſhip againſt an enemy or pirate, the expence of curing and attendance upon the officers or mariners wounded in ſuch defence, the charges of loading and unloading the cargo, and the Park 121. 1 Mag. 64. Da Coſta v. Newnham, 2 T. R. 407.

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wages and proviſions of the workmen hired for the repairs and taking care of the cargo, when a ſhip is obliged to go into port for the benefit of the whole concern.

Plantamour v. Staples, 1 T.R. 611. Note.

Nor do the owners of goods inſured preclude themſelves by ſhifting the goods from one ſhip to another, from recovering an average loſs, ariſing from the capture of the ſecond ſhip, if they acted from neceſſity, and for the benefit of all concerned.

Beawes 150.

The wages and expences of the ſhip's company, during her arreſt by force, and the charges of reclaiming, ſhall be brought into a general average; but not ſailors wages and victuals during quarantine, unleſs it be in performing an extraordinary quarantine.

1 Mag. 67.

Beawes 148.

A maſter, who has cut his maſt, parted with his cable, or abandoned any other part of the ſhip and cargo, in a ſtorm, in order to ſave the ſhip, is well intitled to this compenſation; but if he ſhould loſe them by the ſtorm, the loſs falls only on the ſhip and freight, becauſe the tempeſt alone was the occaſion of this loſs, without the deliberation of the maſter and crew, and was not done with a view to ſave the ſhip and lading.

It is not only the value of the goods thrown overboard, that muſt be conſidered in a general

ral average; but alſo the value of ſuch as re- CHAP. VI
ceive any damage by wet, &c. from the jetſon of the reſt.

The contribution is not made, in general, Park 128.
till the ſhip arrive at the place of delivery: but when a veſſel has been obliged to make a jettiſon, or, by the damages ſuffered ſoon after ſailing, is obliged to return to her port of diſcharge; the neceſſary charges of her repairs, and the re-placing the goods thrown overboard, may then be ſettled by a general average.

When the quantity of damage ſuſtained in the courſe of the voyage is known, and the amount which each of the underwriters is liable to pay, is ſettled, it is uſual for them to indorſe on the policy, "adjuſted this loſs, at "ſo much per cent." or ſome words to the ſame effect. This is called an adjuſtment.

After an adjuſtment has been ſigned by the underwriter, if he refuſe to pay, the owner has no occaſion to go into the proof of his loſs, or any of the circumſtances reſpecting it. Perhaps the true rule upon the ſubject may be better deduced from the following caſes. Hog v. Gouldney, Sitt. after Trin. 174: at Guildhall Lee, C. J. Beawes 31c

In an inſurance on ſhip and goods from London to Shelburne, in Nova Scotia, the policy had been adjuſted by the defendant at Rodgers v. Mayler, Sitt. after Trin. 1790

CHAP. VI. 5*l.* per cent. and it was contended, that he was now bound by that adjuſtment. On the other hand it was argued, that the adjuſtment was not binding, and that, if it were, it ought to have been declared upon ſpecially. Lord Kenyon ſaid, that he did not think it neceſſary to declare on the adjuſtment ſpecially; that it was, prima facie, evidence againſt the defendant; but if there had been any miſconception of the law or fact, upon which it had been made, the underwriter was not abſolutely concluded by it. This turned out to be the caſe, and there was a verdict for the defendant.

De Garron v. Galbraith, Litt. after Trin. 1795. So, in a later caſe, the plaintiff produced no other evidence but the adjuſtment. The witneſs, who proved it, ſwore that doubts had ariſen in the minds of the underwriters ſoon after they had ſigned it, who, thereupon, refuſed to pay. Lord Kenyon ſaid, that, under theſe circumſtances, the plaintiff muſt go into other evidence; which not being prepared to do, he was non-ſuited. A motion was made, in the following Term, to ſet aſide the nonſuit, on the ground that the adjuſtment was, prima facie, evidence of the whole caſe, and threw the onus probandi upon the underwriter; and that it amounted to more than proof of the defendant's ſubſcription to the policy.

Mich. T. 36 Geo. 3.

policy. Lord Kenyon—I admit the adjustment to be evidence in the case, to a certain extent; but I thought at the trial, and still think, that when the same witness, who proved the signature of defendant to the adjustment, said that doubts soon after the adjustment took place, arose in the minds of the underwriters, as to the honesty of the transaction, and they called for further proof, the plaintiff should have produced other evidence; and that to shut the door against inquiry, after an adjustment, would be to put a stop to candour and fair dealing among the underwriters. The rule was refused.

In an insurance upon goods, on board a foreign ship, "the policy to be deemed sufficient "proof of interest in case of loss," defendant suffered judgment to go by default; and, on a motion to set aside the writ of inquiry, the Court of King's Bench said, that although such a policy would be void in this country, by 19 Geo. 2. ch. 37. yet the statute did not extend to policies on foreign ships; and, in this case, the having suffered judgment to go against him by default, has confessed the plaintiff's title to recover, and the amount of that loss was fixed, by his own stipulation in the policy, which he cannot now controvert.

Thellusson v. Fleteher, Dougl. 361.

CHAPTER THE SEVENTH.

OF THE EVIDENCE IN ACTIONS ON POLICIES OF INSURANCE—RECORDS OF FOREIGN COURTS, HOW FAR ADMISSIBLE HERE—PRESUMPTION IN CASE A SHIP HAS NOT BEEN HEARD OF FOR A CERTAIN LENGTH OF TIME—BILLS OF LADING—SHIP'S PAPERS, ETC. PROTESTS OF THE CAPTAIN, MASTER, AND MARINERS.

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IT would be altogether foreign to the purpose of this work, to enter into a minute detail of the evidence that it may be neceſſary to adduce in ſupporting actions on policies of inſurance. Nor indeed is ſuch a detail practicable, without purſuing the whole ſubject of evidence in general. It will be ſufficient here to ſtate thoſe parts only which relate excluſively to the nature of the contract of inſurance.

Park 404. The firſt evidence to be given, is, that the defendant's hand-writing is ſubſcribed to the policy. This is ſeldom required to be done,

as

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as the ſubſcription is uſually admitted; but, in ſtrictneſs, it may be inſiſted on. When the ſignature is proved, or admitted, the court and jury are in poſſeſſion of the extent of the contract, the conditions to be performed on either ſide, and all the other circumſtances relative to the riſk inſured. Although frequent inſtances occur, where the uſage and practice of a particular trade controul as well as extend the written words of a policy; yet, in no caſe, ſhall evidence of any agreement be allowed, which directly tends to contradict the policy.

Lord Chief Juſtice Pemberton ſaid, that policies were ſacred things, and that a merchant ſhould no more be allowed to go from what he had ſubſcribed in them, than he who ſubſcribes a bill of exchange, payable at ſuch a day, ſhall be allowed to go from it, and ſay, it was agreed to be on a condition, when it may be that the bill had been negotiated; for though neither of them are ſpecialties, yet they are of great credit, and much for the ſupport, conveniency, and advantage of trade. Kaimes v. Knightly, Skinner 54.

The policy is evidence, alſo, of the premium having been paid.

It has been determined, that after an adjuſtment has been ſigned by the underwriters, if

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they refuſe to pay, the owner has no occaſion to go into the proof of his loſs. But this rule has of late been ſomewhat relaxed, as appeared by the caſes quoted at the concluſion of the preceding chapter. Lord Kenyon admitted, that an adjuſtment was, prima facie, evidence againſt the defendant; but that if there had been any miſconception of the law, or fact, upon which it had been made, the underwriters were not abſolutely concluded by it.

Ante 175.

Where evidence was offered to prove, that a paper incloſed in the policy was always deemed a part of it, Lord Mansfield decided otherwiſe, ſaying, it was a mere queſtion of law, and that he could not hear ſuch evidence.

Pawſon v. Barnevelt, Guild. Tr. Vac. Dougl. 12. in notis.

The courts here will take notice of the ſentences of foreign courts of admiralty, duly conſtituted; but a condemnation, by ſuch a court, is not, in all caſes, concluſive evidence, that a ſhip is not neutral, unleſs it appear that the condemnation goes upon that ground. A ſentence of a court of admiralty abroad, is binding upon all parties, as to what appears upon the face of it. But where the cauſe of condemnation does not appear to be on the ſpecific ground material to the point in iſſue, evidence will be admitted to explain ſuch point.

Hughes v. Cornelius, 2 Show. 232. Bernardi v. Motteaux, Dougl. 575.

Barzillay v. Lewis, B. R. Trin. Term, 21 Geo. 3.

We

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We find, moreover, from the following case, that the private ordinances of a particular state will not be binding on others not parties, or consenting thereto.

Pollard v. Bell and another, 8 T.R. 434.

The ship Juliana, "*warranted a Dane*," in the policy, was a Danish ship, and the property of Danish subjects. The captain, who was master for the voyage, was a Scotchman. She was captured by a French privateer, and carried into Bourdeaux. At the time of the capture, and during the whole voyage, she had on board every document usually carried by Danish ships. She was condemned in the French courts of admiralty, by virtue of a French ordinance, on the ground that the captain was born in Scotland, and an enemy; and that his quality of enemy sufficed to legitimate the prize. The court were clear in opinion, that the warranty of neutrality was fully complied with, as the ship was condemned for non-compliance with the ordinances of one belligerent power, to which it does not appear that Denmark ever consented. The postea was accordingly given to the plaintiff *.

The

* Helstrom v. Rhodes received a similar decision without argument; and Wigley, who was to have argued it,

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That goods purchaſed with the proceeds of a former illegal cargo may be inſured, appears by the following caſe, which alſo confirms the poſition in the one preceding, relative to the evidence contained in the ſentence of a foreign court of admiralty.

ird v. ppleton, T.R. 562.

This was an action on two policies of inſurance, one on the goods, and the other on the ſhip, "*at and from Canton in China, to Hamburgh*, or *Copenhagen*." The ſhip was an American, and had on board the proper paſſport and credentials. She was taken by the French during the voyage inſured, and condemned as prize, by virtue of a particular ordinance of that country. The captain had taken in an illegal cargo at Bombay, in his outward voyage, which he ſold at Canton, and with the proceeds purchaſed the cargo inſured to Hamburgh. The policy on the ſhip was given up, on account of the illegal adventure. As to the other policy, the counſel for the defendant contended, that the goods inſured, having been purchaſed with the proceeds of

mentioned the caſe of De Souza v. Ewer, Park 361, as a direct authority for the defendant. But Lord Kenyon ſaid, that he was ſatisfied he was miſtaken in that deciſion, and, conſequently, that it could no longer be conſidered as any authority.

an

an illegal cargo, the plaintiff could not recover; that the whole voyage was illegal; that the ſhip was ſeizable, conſequently the goods were not put on board a proper ſhip; and *that the ſentence of condemnation negatived the ſhip being an American.* But the court, after agreeing to the propriety of abandoning the policy on the ſhip, were of opinion, that they could not inquire into the means by which the merchant gains the money that is afterwards laid out in the purchaſe of goods. Arguments, *ab inconvenienti*, were ſufficient to determine it. Lawrence, J. went ſo far as to ſay, that if the money were obtained by robbery on the highway, and inveſted in the purchaſe of a cargo, he did not know why that cargo might not be legally inſured. To render the inſurance illegal, the illegality ſhould exiſt during the courſe of the voyage inſured. Nor did he think the next objection, that the ſhip was liable to ſeizure, well founded. As to the laſt, the caſe of Pollard v. Bell was thought to be directly in point to the preſent caſe; nor did the court ſee any reaſon to alter their opinion on that deciſion. Judgment was given for the plaintiff on this policy, and for the defendant on that which had been abandoned.

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In a caſe of warranty of neutrality, where no ſpecial ground of condemnation was ſtated in the foreign ſentence, but the ſhip was condemned generally as *good and lawful prize*, the court there conſidered it as concluſive evidence that the property was not neutral.

Saloucci v. Woodmaſs, B. R. Hil. 24 Geo. 3.

But if the ground of deciſion appear to be not on the want of neutrality, but a foreign ordinance, manifeſtly unjuſt, and contrary to the law of nations, and the inſured has only infringed ſuch a partial law, that ſhall not be deemed a breach of his warranty ſo as to diſcharge the inſurer.

Mayne v. Walter, B. R. Eaſt. 22 Geo. 3.

For the ſake of perſpicuity we will further ſtate, that though a veſſel be condemned as prize, yet, if the grounds of the ſentence appear manifeſtly to contradict ſuch a concluſion, the court here will not diſcharge the underwriters, by declaring that the inſured has forfeited his neutrality.

Saloucci v. Johnſon, B. R Hil. 23 Geo. 3. Park 364.

In a late caſe, Lord Kenyon rejected the ſentence of a court of Vice Admiralty abroad, *as evidence of the facts contained in it*; though he admitted it to be read to prove the mere fact of a condemnation having taken place; and this he did, notwithſtanding an orderof the Court of Exchequer directing that it ſhould be admitted in evidence.

Wright v. Barnard, Sitt. after Mich. 1798, at Guildhall.

We

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We shall now proceed to another branch of our present inquiry. A ship which has not been heard of for a certain time after her departure, shall be presumed to have perished at sea. Green v. Brown, 2Stra.1199.

The practice among merchants is, that a ship shall be deemed lost if not heard of within six months after she is known to have sailed upon a voyage in Europe, or within twelve months if for a place at a greater distance. Park 63.

A bill of parcels with the receipt to it, and proof of the hand-writing, has been admitted as sufficient evidence of interest in the plaintiff. Russel v. Boehm, 2Stra.1127.

The usual documents to prove interest in the property insured are, bills of sale, bills of parcels, the costs of the outfit, the bills of lading, signed by the master, specifying the goods received on board, and for whom he is to carry them; and also custom-house clearances. Park 405,6.

In an action, stating in the declaration, that the plaintiff was possessed of one third of the ship on which the insurance was made, it was proved that the plaintiff had purchased the whole ship at one period; and as there was no evidence to shew that he had since parted with any share of it, the counsel for the defendant Page v. Rodgers, Sittings at Guildhall Hil. Vac. 1785.

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fendant inſiſted that the plaintiff had not proved his declaration, which alleged him to have but one-third. Lord Mansfield overruled the objection, ſaying that this was, *prima facie*, ſufficient evidence; for, "*omne* "*majus continet in ſe minus.*"

Senat v. Porter, 7 T. R. 158.

In another caſe, the broker of the aſſured ſhewed the captain's proteſt to the underwriter, ſtating the circumſtances of the loſs of the ſhip, and demanding payment; but on a motion for a new trial, the court held, that the delivery of this paper to the defendant did not intitle him to read it as evidence of the facts contained in it; though, if the captain had been called to give a different account of the loſs from that contained in the proceſs, it might have been produced, to ſhew that he was not worthy of credit.

Park 408.

Where a loſs is averred to be by perils of the ſea, and ſome of the goods are ſpoiled and others ſaved, it is allowable to give the expence of the ſalvage in evidence upon ſuch an averment, becauſe it is a conſequence of the cauſe of action laid in the declaration.

Carey v. King, Ca. Temp. Haruwicke, B. R. 304.

The queſtion was, Whether the plaintiff might give in evidence the expence of ſalvage? that not being particularly laid as a breach of the policy in the declaration.

Lord

Lord Hardwicke, Chief Juſtice.—" I think " they may give it in evidence; for the inſur- " ance is againſt all accidents. The acci- " dent laid in this declaration is, that the ſhip " ſunk in the river; it goes on and ſays, that " by reaſon thereof the goods were ſpoiled; " that is the only ſpecial damage laid: yet, " it is but the common caſe of a declaration " that lays ſpecial damage, where the plaintiff " may give evidence of any damage that is " within his cauſe of action as laid. And " though it was objected that ſuch a breach " of the policy ſhould be laid, as the inſurer " may have notice to defend it; it is ſo in " this caſe, for they have laid the accident, " which is ſufficient notice, becauſe it muſt " neceſſarily follow that ſome damage did " happen."

CHAPTER THE EIGHTH.

CONCLUSION—WHAT ARE THE MATERIAL POINTS TO BE CONSIDERED IN BRINGING OR DEFENDING ACTIONS ON POLICIES OF INSURANCE, VIZ.—VALIDITY OR LEGALITY OF THE CONTRACT—OF THE INSTRUMENT, WHETHER SINGLE, DOUBLE, OR RE-ASSURANCE—OF THE THING INSURED, AND OF THE VOYAGE—LASTLY, THE NATURE OF THE LOSS SUSTAINED, AND THE EVIDENCE THEREOF.

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AFTER what has been already advanced in the former part of this work, little more can be added that will materially elucidate the ſubject of inſurance. Yet, it may not be an unneceſſary taſk to recur to the leading points of the inveſtigation we have gone through, with a view to a direct application of the principles attempted to be explained.

By directing the attention to ſuch parts of the ſubject, only, as are applicable to any particular

particular case that may arise, we form an opinion with the more ease and certainty; and may thus avoid the expence of a law-suit, where the grounds of complaint or defence are found untenable. For instance, it will naturally occur to an insured who has sustained a damage to ask the question, how he is to compel satisfaction in case of a dispute?—what situation he must stand in?—what he must take care to have done?— what he must prove to intitle him to redress at law? So, also, the insurer will ask what circumstances will enable him to make a good defence, whether arising from the omissions or defaults of the insured or his agents, or from any other circumstance in the transaction?

Perhaps the natural order of the proceedings in effecting a policy of insurance will be the easiest and shortest course we can take in answering the above queries satisfactorily. Beginning, then, with the contract:—There are implied engagements of each party, independent of the written instruments, that must necessarily be performed to make it binding; for the least shadow of fraud, or undue concealment of facts, has been constantly held to annul and vacate policies. On the part of the insured, these implied engagements may be

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be reduced to the general heads of ſea-worthineſs of the veſſel—legality of the voyage, and ſubject matter of the inſurance—truth of repreſentation, or the diſcloſure of material circumſtances: to the laſt of which the inſurer is alſo equally bound.

If all or any of theſe implied engagements on the part of the aſſured ſhould have been broken, or omitted to be performed, the underwriter, in ſuch event, will have a good defence to any action that may be brought againſt him.

Theſe different heads have been already ſufficiently canvaſſed in the ſecond chapter; and to that the reader is referred for more particular information.

Should there be no reaſonable objection made to the contract on any of the above grounds, we come next to the conſideration of the inſtrument, by which the direct terms of the agreement are aſcertained. Here the parties ſhould inquire carefully whether the policy contain a ſingle, double, or re-aſſurance —whether it be printed or engroſſed on a legal ſtamp, containing the terms of the contract of indemnity—whether it be valued or open, and ſigned by the underwriters.

Although ſigned only by one of the parties, we

we have seen that both the insurer and insured are equally bound to the conditions expressed therein.

If the insurance be single, and this applies equally to valued and open policies, the construction of the agreement is the first thing to be attended to, agreeably to the principles established in the first chapter. If the insurance be double, then it should be considered against which of the underwriters it may be most advisable to bring an action or make a claim; since the insured can only recover one satisfaction for his loss. But it frequently happens that he has it in his option to proceed against the underwriters upon either insurance, as prudence may dictate.

1 Blackst. Rep. 416.

As this contract is always entered into for the purpose of indemnity in case of a loss, it follows, as a necessary consequence, that a man shall not recover more than he has lost. And though one insurer, on such a policy, must pay the whole demand, yet, he has a claim against the other, *pro rata*, and may bring his action accordingly.

If it be a re-assurance, then it is necessary that it be conformable to the act of parliament; for every re-assurance in this country, either by British subjects or foreigners, or British

Andree v. Fletcher, 2 T.R. 161.

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Britiſh or foreign ſhips, is void by ſtatute 19 Geo. 2. chap. 37. ſec. 4. *unleſs the firſt aſſurer be inſolvent, become a bankrupt, or die.*

The thing inſured is the next ſubject of conſideration, and the intereſt of the inſured therein; for it is declared by the laſt quoted ſtatute, that inſurances made on ſhips or goods, intereſt or no intereſt, or without further proof of intereſt than the policy, or by way of gaming, or wagering, or without benefit of ſalvage to the inſurer, ſhall be void. But ſec. 2. contains an exception for inſurances on private ſhips of war fitted out to cruize againſt the King's enemies; and ſec. 3. on any merchandizes or effects from any ports or places in Europe or America belonging to the crown of Spain or Portugal.

Dougl. 301. The ſtatute does not extend to inſurances of foreign property, and on foreign ſhips.

Ante 114. For other conſtructions on this ſtatute ſee the fifth chapter.

As all inſurances upon commodities, the importation or exportation of which is prohibited by law, are void; and this, whether the inſurer did or did not know that the ſame were prohibited commodities; it becomes a matter of the higheſt importance to attend ſtrictly to this diviſion of the ſubject, to ſepa-

rate lawful from prohibited merchandizes; inſurable intereſts from ſuch as are not ſo conſtrued; and alſo, to ſee whether the deſcription in the policy will cover the goods ſhould they be loſt.

In regular order, we muſt next follow the nature of the voyage, whether prohibited by the common law, ſtatute, or maritime law of this country, or permitted by them—whether there has been a due compliance with warranty—any deviation from the voyage inſured, or changing the ſhip without ſufficient neceſſity—becauſe, in either of the latter caſes, a good defence may be made by the underwriters to any action brought againſt them.

The laſt ſubject to which it is proper to direct our attention, is the nature of the loſs ſuſtained, whether within the terms and meaning of the policy; and the evidence that can be adduced in proof thereof.

After all that has been ſaid, much muſt remain in the diſcretion and good ſenſe of the parties, whoſe judgment ought, in a great meaſure, to be governed by the particular circumſtances of each caſe. Yet, it is hoped that the foregoing hints may ſave trouble, by taking the heads in the natural order

in

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in which they ſeem to ſpring out of the contract. For it were needleſs labour to make any inquiry into the circumſtances of a loſs, if the contract be invalid in the firſt inſtance, by miſrepreſentation or concealment of material circumſtances—if it be reduced to writing on an improper ſtamp—if it be an illegal inſurance—or if the goods inſured be either contraband, or not properly belonging to the inſured.

The ſame order of conſidering this ſubject will equally ſerve the inſurer and inſured.

19 Geo. 2. ca. 37. ſ. 6.

Before this ſubject is concluded, it may be remarked, that by the ſtatute 19 Geo. 2. it is declared*, "That in all actions or ſuits, "brought or commenced by the aſſured upon "any policy of aſſurance, the plaintiff, in ſuch "action or ſuit, or his attorney or agent, "ſhall, within fifteen days after he or they "ſhould be required ſo to do, in writing, by "the defendant, or his attorney or agent, de-"clare what ſum or ſums he had aſſured, or

Park 403.

* When gaming inſurances without intereſt were aboliſhed by the legiſlature, it became neceſſary, effectually to anſwer the purpoſe intended, to order that a diſcloſure of all inſurances effected on the ſame property ſhould be made, even after an action brought, as by the ſtatute above quoted.

"cauſed

"caused to be assured in the whole, and what "sums he had borrowed at respondentia or "bottomry for the voyage in question in such "suit or action."

And it is enacted, "that it shall and may Sec. 7. "be lawful for any person or persons, body or "bodies corporate, sued in any action or "actions of debt, covenant, or any other action "or actions on any policy or policies of insur-"ance, to bring into court any sum or sums "of money; and that if any such plaintiff or "plaintiffs refuse to accept such sum or sums "of money so brought into court as aforesaid, "with costs to be taxed in full discharge of "such action or actions, and afterwards pro-"ceed to trial in such action or actions, and "the jury do not assess damages to such plain-"tiff or plaintiffs exceeding the sum or sums "of money so brought into court, such plain-"tiff or plaintiffs, in every such case and cases, "shall pay to such defendant or defendants, in "any such action or actions, costs to be taxed, "any law, custom, or usage to the contrary "notwithstanding."

No covenant for referring disputes can oust the superior courts at Westminster of their jurisdiction. This appears in two cases, in one of which a clause was inserted in the po-

Kill v. Hollester, 1 Wilf. 129. Thompson & Charnock 8 T.R. 139.

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licy, that every diſpute ſhould be referred to arbitration; and the plaintiff averred, in his declaration, that there had been no reference. The point, whether this action would lie before a reference had been made, having been reſerved by the court, they were unanimouſly of opinion, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot ouſt this court: and as no reference has been, nor any is depending, the action is well brought, and the plaintiff muſt have judgment.

IT is not conformable to the plan of this work, being that of an abridgment, to proceed further in the detail. The leading features of the proceedings upon a marine inſurance have been chalked out; and where it appeared likely that the parties in ſuch tranſactions would find practical utility in a particular and minute diſcuſſion, the inveſtigation has been more laboured and circumſtantial. The author feels that he has much reaſon to call for the indulgence of his readers; but he hopes, notwithſtanding, that this ſhort work may not be without its benefits and advantages.

APPEN-

APPENDIX.

THE following Caſes having been publiſhed ſince this book went to the preſs, it is preſumed they will make no unacceptable addition to its uſefulneſs even in this indigeſted way, reference being made to the body of the work where their application is more immediate and direct.

THE premium paid on an illegal aſſurance, to cover a trading with an enemy, cannot be recovered back, though the underwriter cannot be compelled to make good the loſs.

Vandyke & others v. Hewitt, Mic. Term, 41 Geo. 3. 1 T.R. New Series, 96. Vide ante 114 and 447.

Thus it appeared that goods had been ſhipped on a *Pruſſian* neutral veſſel, on account partly of the plaintiffs, who were naturalized foreigners reſident in *London*, and partly of certain other perſons, aliens, then reſident in *Holland*. The inſurance was aban-

doned at the trial, on the ground of its being intended to cover a trading with an enemy's country, and therefore falling within the deciſion of the caſe of *Potts v. Bell*; but it was contended for the plaintiffs that they were intitled to recover back the premium, becauſe the policy never attached. Verdict for the plaintiff, with liberty to move to ſet the ſame aſide, and enter a verdict for the defendant. A rule niſi having been accordingly obtained,

Erſkine, *Park*, and *J. Warren*, now ſhewed cauſe. Here was no fraud intended, as in the caſe of ſmuggling tranſactions. The aſſured are neutral foreigners, who have paid money to the defendant for a certain conſideration, the benefit of which they are precluded from receiving by a rule of public policy: it is but juſt, therefore, that as the inſurance never attached, and the underwriter has not incurred any riſk, he ſhould not be ſuffered to retain the conſideration*. Admitting the contract to be illegal, yet, according to *Lacauſſade v. White*, the party who has depoſited money upon an illegal conſideration (as in that caſe upon an illegal wager) may recover it back again, even after the event is determined

* Tyrie v. Fletcher, ante 115.

againſt

againſt him. They alſo referred to the caſe of *Neſbitt v. Whitmore* in Eaſter Term preceding, and where finally the premium was returned*.

Law and *Garrow*, contra, were ſtopped by the Court.

Lord Kenyon, C. J. "There is no diſtinguiſhing this on principle from the common "caſe of a ſmuggling tranſaction. When "the vendor aſſiſts the vendee in running the "goods, to evade the laws of the country, he "cannot recover back the goods themſelves,

* In that caſe, under ſimilar circumſtances with the preſent, *Giles*, for the plaintiff, admitted, that he could not recover the loſs; but contended, that he was intitled to take a verdict for the premium, which had not been paid into court. This was reſiſted by *Park* for the defendant, on the ground that no ſuch queſtion had been reſerved at the trial. *Et per curiam*, That point not having been made, and the jury not having aſſeſſed any ſuch damages, but only the amount of the loſs to be recovered, ſuppoſing the plaintiffs to be intitled to it in point of law, we cannot now interpoſe any other ſum in lieu of their verdict. Whereupon *Giles* prayed leave to amend the verdict by the Judge's notes. *The Court*, with much reluctance, and with a view to a compromiſe, granted a rule to ſhew cauſe. And afterwards it was agreed between the parties, that the premium ſhould be repaid, without coſts on either ſide.

" or the value of them. The rule has been " ſettled at all times, that when both parties " are in *pari delicto*, which is the caſe here, " *potior eſt conditio poſſidentis* "

Rule abſolute for the verdict to be entered for the defendant.

Vide ante 42—44.

If a policy of inſurance be effected on a ſhip foreign built, though Britiſh owned, it is not incumbent on the aſſured to communicate that circumſtance to the underwriter at the time of effecting the policy; as ſuch a ſhip is not required to be regiſtered, and may therefore ſail without convoy, being within the exception of the convoy act.

28 Geo. 3. c. 76. ſ. 6.

Long v. Duff, Idem v. Bolton, Trin. 40 Geo. 3. 2 Boſ. & Pull. 209.

Thus, in two actions on policies of inſurance on the *Lucy*, a *Spaniſh* built ſhip purchaſed at *Hamburgh* by the plaintiff, a *Britiſh* ſubject, at and from *Padſtow* in *Cornwall* to *Leghorn*. Verdicts were given for the plaintiff in both actions, and a rule niſi for new trials was obtained under the following circumſtances. The ſhip had not been regiſtered, but paid the alien duties. Previous to ſetting ſail upon the voyage inſured, the captain had applied to the Admiralty for a licence to proceed without convoy to *Leghorn* and *Naples*, but only obtained a licence for Naples; notwithſtanding which he proceeded on the voyage

voyage to *Leghorn* without convoy, and was captured by a *French privateer*. It was repreſented to the underwriters in the former caſe, at the time of effecting the policy, that the *Lucy* was a foreign built ſhip, and not regiſtered; but in the latter it was not mentioned.

It was objected, on the part of the defendant in both actions, that, as the licence did not extend to the voyage inſured, the *Lucy*, though a foreign built ſhip *Britiſh* owned, was within the proviſion of the 38 Geo. 3. c. 76. which makes void all policies upon ſhips ſailing without convoy; and, in the ſecond, that ſuppoſing her not to be within the proviſions of the convoy act, that circumſtance ought to have been communicated to the underwriters. The rule had been obtained on theſe grounds, and afterwards argued; and on this day the 26th opinion of the court was delivered by Lord Eldon, C. J. "There was nothing to diſtinguiſh the caſe of *Long* v. *Duff* from *Long* v. *Bolton*, except this ſingle circumſtance, viz. "that, in the latter, it was not diſcloſed to "the underwriters that the ſhip in queſtion "was of ſuch a peculiar deſcription as not "to fall within the proviſions of the convoy "act. With reſpect to which we are all of "opinion, that it was properly left to the jury

" to determine, whether, according to uſage, " it was the duty of the aſſured to give this " information, or of the underwriter to ſatisfy " himſelf upon that point. The jury have " decided, that it was the buſineſs of the un- " derwriter to obtain this information for " himſelf.

" With reſpect to the general point, the " queſtion is, whether a veſſel, in the ſituation " of the *Lucy*, departing without convoy, (not " having obtained a proper licence ſo to do) " can be deemed to be protected by the po- " licy? or, whether that policy is not altoge- " ther void under the proviſions of the 38 " Geo. 3. c. 76. ſ. 4. which declares, that " every policy of inſurance on any ſhip or " cargo, within the purview of the act, which " ſhall depart without convoy, or ſhall wil- " fully deſert its convoy, ſhall be null and " void."

After a very learned and elaborate argument, wherein his Lordſhip entered into a detail of the ſtatute law relative to ſhipping, but particularly to the 26 Geo. 3. c. 60. on which the preſent queſtion principally depends, he went on: " After the beſt conſideration which " I have been able to give that ſtatute, and " after converſing upon it with the noble Lord " who

" who framed it *, as well as with the learned " author of the treatiſe †, to which it gave " riſe, the determination I have come to, is, " *that foreign built ſhips, in Britiſh ownerſhip,* " *are not required to be regiſtered,* and, conſe- " quently, that this verdict muſt ſtand."

It appeared in evidence at the trial in this cauſe, that Meſſrs. *Hyde* and *Hobbs*, merchants at *Chicheſter*, had, through agency of the plaintiff, purchaſed a quantity of corn; that, on the 27th of December, 1798, they informed the plaintiff by letter, that, thinking the engagement might be too large for themſelves, they had offered another houſe *(Hacks)* a joint concern in the corn, which had been accepted; and at the ſame time directing the plaintiff to effect an inſurance on the cargo, which he did on the 28th of January following. The invoices were made out to *Hyde* and *Hobbs*, and payment for the cargo was made by them. It was objected, on the part of the defendant, that the evidence contradicted the averment, that Meſſrs. *Hyde* and *Hobbs* were intereſted in the ſaid corn to *a large amount, to wit, to the amount of all the money inſured thereon.*

Page v. Fry, Trin. 40 Geo. 3. 2 Boſ & Pull. 2. 240. Vide ante 47.

* Lord Hawkeſbury, now the Earl of Liverpool.

† Beawes's Law of Shipping.

Lord Eldon, before whom the cauſe was tried, directed the jury to find a verdict for the plaintiff, but gave leave to the defendant to move for a nonſuit.

After argument on the rule niſi, Lord Eldon ſaid, "The queſtion is, whether Meſſrs. "*Hyde* and *Hobbs* had ſuch an intereſt in the "whole cargo as will ſupport the averment in "queſtion. An inſurable intereſt is a very "different intereſt from moſt others that can "be ſtated."

His Lordſhip, after quoting ſeveral caſes *, declared his opinion on this to be very clear, he thought the plaintiff had a ſufficient intereſt

* The caſes were, *Le Cras* v. *Hughes*, Park 268, and *Crawford and others* v. *Hunter*, 8 T. R. 13. The former caſe decided, that the officers and crew of ſhips of war had an inſurable intereſt in their prizes before condemnation; ſee alſo ante 47. The latter caſe, that commiſſioners appointed by the Crown, under the authority of 35 Geo. 3. c. 80. ſ. 21. which enabled them "to "take into their poſſeſſion and care all *Dutch ſhips and* "*effects detained or brought into the ports of Great Bri-* "*tain*, and to manage, ſell, and diſpoſe of the ſame to "the beſt advantage, according to the inſtructions they "ſhould receive from his Majeſty and his Privy Coun-"cil," may inſure in their own names ſuch ſhips and effects after ſeizure abroad, and while they are in tranſitu in this country.

throughout

throughout the intirety of this cargo, notwithſtanding other perſons had a beneficial intereſt in a part, to ſupport the averment in the declaration. Rule diſcharged.

In an action on a policy of inſurance, with a count for money had and received, if the defendant pay no money into court, but eſtabliſh as a defence that the riſk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counſel in the opening of the caſe.

Thus in aſſumpſit on a policy of inſurance, with a count for money had and received, defendant paid no money into court, and the defence ſet up was, that the ſhip was not ſeaworthy; and upon this point, without any direct evidence of fraud, the caſe went to the jury. They found a verdict generally for the defendant, it not having been intimated to them that the plaintiff would be intitled to a verdict for a return of premium.

Penſon v. Lee, Mich. 41 Geo. 3. 2 Boſ. & Pull. 330. Ante 111 & 114.

A rule niſi having been obtained upon a former day, to enter a verdict for the premium, upon the count for money had and received, *Lord Eldon* delivered the opinion of the Court, after having converſed with Lord Kenyon on the ſubject.—"We have made

"inquiries reſpecting the practice on this "ſubject, and find that *Lord Kenyon* is of opi-"nion, that, in caſes of this kind, the plain-"tiff is intitled to a verdict for the premium. "Without entering into any reaſoning upon "the ſubject, we have only to ſay, that the "verdict in this caſe muſt be entered for the "plaintiff, on the count for money had and "received; but, as there may be caſes in "which the application of this practice may "work injuſtice, we hope that the plaintiff's "counſel will in future demand the premium "in his opening, when he means to inſiſt "upon it on failure of his claim for the loſs." Rule abſolute.

The following Caſe was given to the Author by a much reſpected friend, lately called to the Bar, who was in court when it came on to be heard; and is here given in order to embrace the lateſt information on the ſubject of inſurance.

Hurry and others v. the Royal Exchange Aſſurance Company,

Action upon a policy of inſurance againſt the Company as the inſurers.—Policy upon a cargo of hemp on board the ſhip Royaliſt.

The plaintiffs claimed the amount of a

partial loſs owing to the damage ſuſtained by a part of the cargo inſured, whilſt it was on board a hired lighter, which had brought the hemp in queſtion from the ſhip, and was lying, at the time of the accident, at the wharf where the hemp was to be landed. The lighter arrived at the wharf on the Saturday evening, too late for landing the hemp, and the conſequence was, that it was obliged to lie in the lighter till the Monday morning. Before the Monday morning, by the violence of the tide, or by ſome accident, the lighter had hitched on one ſide againſt the wharf, the water had got in, and the hemp was damaged.

Sitt. after Hil. Term, March 5, 1801, at Guildhall, before Lord Eldon, C.P

Mr. Park, for the defendant, inſiſted, that this caſe ought to be governed by the caſe of *Sparrow* and *Carruthers*, where it was decided, that the delivery of goods into a lighter of the aſſured was the termination of the riſk.

On the other hand, Mr. Serjeant Heywood, for the plaintiff, cited, from his own note book, the caſe of *Rucker* v. the *London Aſſurance Company*, determined by Mr. Juſtice Buller, at Guildhall, in the year 1793.—That learned judge there held, that a lighterman is a perſon having a public character, and is intitled to public credit and confidence, in the performance

performance of the duties of ſuch character. That when a hired lighterman is conveying goods from the ſhip to the wharf, he is not the lighterman of one party, but of both parties; and that unleſs the lighter be the private property of the aſſured, the underwriter's riſk continued whilſt the goods were on board ſuch lighter.

Lord Eldon, in ſumming up, adopted and illuſtrated the opinion of Mr. Juſtice Buller. He ſaid, that in ſome caſes, particularly circumſtanced, the aſſured might ſend expreſsly for the goods; as for inſtance, he might ſend his own private lighter to receive them, and, in ſuch caſe, the underwriter might be exonerated. But he certainly coincided with Mr. Juſtice Buller, that a lighterman, who is a ſworn ſervant of the public, ought to be conſidered as a perſon to whom the underwriter gives his confidence, when he writes a policy. By the expreſs words of a policy upon goods, the riſk of the inſurer continues till the goods are landed. He was not diſpoſed to allow men to ſet up a contract different from the written words of the inſtrument by which that contract is made; and he believed, that if Lord Chief Juſtice Lee had continued to preſide in that court till the preſent day, he would

would not have ſanctioned thoſe deciſions, by which men were permitted to ſay one thing by a written inſtrument, ſolemnly ſubſcribed, and to ſay a different thing, afterwards, by means of parol evidence.

He told the jury to conſider, 1ſt, whether the loſs in queſtion happened by any miſconduct or negligence of the lighterman: if ſo, they muſt find for the defendant, ſince ſuch loſs was not within the meaning of the policy.

If they thought that proper ordinary care had been uſed by the lighterman and his ſervants, then they would find for the plaintiff; if the loſs was ſuch as would have been within the meaning of the policy whilſt the goods continued on board the ſhip.

He alſo obſerved, that he thought a loſs occaſioned by the negligent mooring of the lighterman, or his people, was not ſuch a loſs as the underwriters were liable for. But if the loſs happened from any accident occaſioned by the violence of the ſtream, or from any perils of the river, of the ſame nature with thoſe inſured againſt in the policy, then he thought the inſurers were certainly anſwerable.—Verdict for the plaintiff.

Common

Common Form of a Policy on Ship or Goods, with references to ſuch Parts of the Treatiſe as relate to the Conſtruction that has been put upon ſeveral of the Clauſes in our different Courts of Juſtice.

IN THE NAME OF GOD, Amen.

as well in own name *(a)*, as for and in the name and names of all and every other perſon and perſons to whom the ſame doth, may, or ſhall appertain, in part or in all, doth make aſſurance and cauſe and them, and every of them, to be inſured, loſt *(b)* or not loſt, at and *(c)* from

upon any kind of goods and *(d)* merchandizes, and alſo upon the body, tackle, apparel *(e)*, ordnance, munition, artillery, boat, and other furniture *(f)*, of and in the good ſhip or veſſel called the *(g)*

whereof is maſter *(h)*, under God, for this preſent voyage,

or whoſoever elſe ſhall go for maſter, in the ſaid ſhip, or by whatſoever other name or names the ſame ſhip, or the maſter there-

(*a*) Vide pages 7 and 8. (*b*) Vide page 12. (*c*) Vide 21, 22, 83. (*d*) 9, 10, 11, 44, 45, 48, 180. (*e*) 33. (*f*) 33. (*g*) 9, 108. (*h*) 9.

of,

of, is or ſhall be named or called; beginning the (*i*) adventure upon the ſaid goods and merchandizes from the loading (*k*) thereof, aboard the ſaid ſhip,

upon the ſaid ſhip, &c.

and ſo ſhall continue and (*l*) endure, during her abode there, upon the ſaid ſhip, &c. And further, until the ſaid ſhip, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatſoever, ſhall be arrived at (*m*)

upon the ſaid ſhip, &c. until ſhe hath moored at anchor twenty-four hours in good ſafety (*n*); and upon the goods and merchandizes, until the ſame be there diſcharged and ſafely landed (*o*). And it ſhall be lawful for the ſaid ſhip, &c. in this voyage, to proceed and ſail to, and touch and ſtay (*p*) at, any ports and places whatſoever,

without prejudice to this inſurance; the ſaid ſhip, &c. goods and merchandizes, &c. for ſo much as concerns the aſſureds, by agreement between the aſſureds and aſſurers, in this

(*i*) 11, 26, 76, 84, 109. (*k*) Idem as i. (*l*) 27, 32. (*m*) 16, 23, 25, 27. (*n*) 17, 18, 19. (*o*) 16, 27. (*p*) 31, 93.

policy,

policy, are and ſhall be valued at

Touching the adventures and perils, which we the aſſurers are contented to bear, and do take upon us in this voyage, they are of the ſeas(*q*), men of war, fire, enemies, pirates, rovers, thieves (*r*), jettiſons, letters of mart and counter-mart, ſurpriſals, takings at ſea, arreſts (*s*), reſtraints and detainments of all kings, princes, and people (*t*), of whatever nation, condition, or quality ſoever; barratry (*u*) of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage (*v*) of the ſaid goods and merchandizes, and ſhip, &c. or any part thereof. And in caſe of any loſs or misfortune, it ſhall be lawful to the aſſureds, their factors (*w*), ſervants, and aſſigns, to ſue, labour, and travel for, in, and about the defence, ſafeguard, and recovery of the ſaid goods and merchandizes, and ſhip, &c. or any part thereof, without prejudice to this inſurance; to the charges (*x*) whereof, the aſſurers will contribute each one according to the rate and quantity of his ſum herein aſſured.

(*q*) 11, 29, 52, 123. (*r*) 12. (*s*) 12, 33, 130, 131, 132, 133. (*t*) 12, 131. (*u*) 133 to 139. (*v*) 5, 33, 122, 130, 133, 144, 171, 185. (*w*) 8, 9, 52, 121. (*x*) 66, 68, 171.

And

And it is agreed, by us the inſurers, that this writing, or policy of aſſurance, ſhall be of as much force and effect as the ſureſt writing or policy of aſſurance, made in *Lombard Street* or in the *Royal Exchange*, or elſewhere in London. And ſo we the aſſurers are contented, and do hereby promiſe and bind ourſelves, each one for his own part, our heirs, executors, and goods, to the aſſured, their executors, adminiſtrators, and aſſigns, for the true performance of the promiſes, confeſſing ourſelves paid the conſideration (*y*) due unto us for the aſſurance by the aſſured

at and after the rate of

In witneſs whereof, we, the aſſurers, have ſubſcribed our names and ſums (*z*) aſſured in London.

N. B. Corn (*a*), fiſh, ſalt (*b*), fruit, flour, and ſeed, are warranted free from average (*c*), unleſs genera (*d*), or the ſhip be ſtranded (*e*);

(*y*) 5, 7, 11, 13, 111, 112, 114, 121. (*z*) 14, 38 to 40, 94. (*a*) 10, 169. (*b*) 10. (*c*) 10, 152 to 168—170, 171, 172, 173. (*d*) Ditto. (*e*) 10, 123, 151—170.

ſugar, tobacco, hemp, flax, hides, and ſkins, are warranted free from average, under five pounds per cent. And all other goods, alſo the ſhip and freight, are warranted free of average, under three pounds per cent. unleſs general, or the ſhip be ſtranded.

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FINIS.

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ERRATA.

In Page 45, near the middle, for "*alike*" read "*alone.*"
77, in the margin, for "*Be*" read "*Bell.*"
85, ——— for "*Hubbert*" read "*Hibbert.*"
143, near the middle, for "*insurer*" read "*insured.*"